Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

UNION CARBIDE CORPORATION,

Petitioner,

v.

THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO: 02-C-9004 AND 02-C-9005),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment permits a jury to adjudge punitive damages prior to receiving evidence of the relationship between the defendant's conduct and any plaintiff's harm.

2. Whether a West Virginia court may, consistent with principles of federalism, award punitive damages for the injuries of hypothetical workers suffered as a result of unlawful conduct at a chemical plant in Ohio.

3. Whether a State Court endeavoring to address the perceived exigencies presented by thousands of asbestos cases may disregard settled due process rights, as encompassed in the Due Process Clause of the Fourteenth Amendment, and principles of federalism through:

(a) an aggregation of those cases despite a conceded and recognized absence of commonality and clear prejudice to the defendants; and

(b) application of that court's forum law in contravention of its own choice of law rules and without any inquiry as to the interests of its state or any other state in applying their law.

4. Whether the Due Process Clause of the Fourteenth Amendment permits a finding of collateral estoppel when the party against whom the preclusive effect of the earlier decision is applied has not had a "full and fair opportunity" to litigate that issue in the earlier case.

PARTIES TO THE PROCEEDING

Petitioner is the Union Carbide Corporation. Respondents are The Honorable Arthur M. Recht, The Honorable Booker T. Stephens, and The Honorable Alan D. Moats, in their capacities as judges/special appointees of the West Virginia Mass Litigation Panel who presided over the phase one mass trials. In particular Judges Recht and Stephens jointly presided over the combined product and premises liability trial (Civil Action No: 02-C-9004), and Judge Moats presided over the deliberate intent proceedings (Civil Action No: 02-C-9005). There are approximately 4500 plaintiffs (4200 product liability claims and 320 premises liability claims) in Civil Action No: 02-C-9004 and 130 plaintiffs in Civil Action No: 02-C-9005 with alleged claims against Petitioner. No caption in either proceeding identifies those individuals. Petitioner attaches at Appendix O an unofficial list of the individuals it believes were subject to the phase one mass trials.

CORPORATE DISCLOSURE STATEMENT

Petitioner Union Carbide Corporation is wholly owned by The Dow Chemical Company ("TDCC"). TDCC has no parent companies, and no other publicly held company owns 10 percent or more of TDCC's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xiv
Opinions and Judgments Below	1
Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
Reasons for Granting Petition	15
I. Requiring The Jury To Determine Punitive Damages Without Any Evidence Of The Relationship Between Union Carbide's Actions And Any Plaintiff's Harm Violates Union Carbide's Right To Due Process	15
II. Determination Of Punitive Damages Predicated On Premises Conditions At Out-of-State Facilities Violates The Principles Of Federalism Embodied In *State Farm v. Campbell*	17

Contents

Page

III. To Clear Court Dockets Of Asbestos Claims West Virginia's Phase I Trial Violated Union Carbide's Right To Due Process And Principles Of Federalism 19

IV. The Collateral Estoppel Ruling On Deliberate Intention Violated Union Carbide's Due Process Right To Have A Full And Fair Opportunity To Litigate The Claim At Issue 26

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 24

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 20, 21, 24

In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) 22

Armstrong v. Manzo, 380 U.S. 545 (1965) 19

Arrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969) 22

In re Asbestos Litigation, 829 F.2d 1233 (3d Cir. 1987) 27

BMW of N. America, Inc. v. Gore, 517 U.S. 559 (1996) 18

Bandini Co. v. Superior Court, 284 U.S. 8 (1931) 6

Barr Rubber Prods. Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970) 22

Bigelow v. Virginia, 421 U.S. 809 (1975) 18

Blonder-Tongue Labs, Inc. v. University of Ill. Found., 402 U.S. 313 (1971) 26

Boddie v. Connecticut, 401 U.S. 371 (1971) 19

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 24

Cited Authorities

Page

In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals, 288 F.3d 1012 (7th Cir. 2002) 23

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 17

Bruce v. Tobin, 245 U.S. 18 (1917) 10

California v. Ramos, 463 U.S. 992 (1983) 20

In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) 22

In re Consol. Parlodel Litig., 182 F.R.D. 441 (D. N.J. 1998) 22

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 19

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7, 8, 10

Day v. Woodworth 54 U.S. 363 (1852) 16

Fisher v. District Court, 424 U.S. 382 (1976) 6

Fleishman v. Prudential-Bache Securities, Inc., 103 F.R.D. 623 (E.D. Wisc. 1984) 22

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 9

Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) 22

Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) 21

Cited Authorities

	Page
Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996)	24
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	16
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	8
Greene v. Carolina Freight Carriers, 663 F. Supp. 112 (S.D.W. Va. 1987)	27, 28
Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954)	22
Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982)	26
Harper v. Va. Dept. of Taxation, 509 U.S. 86 (1993)	20
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	21
Jacob v. New York City, 315 U.S. 752 (1942)	17
Jacobs v. E.I. Du Pont De Nemours & Co., 67 F.3d 1219 (6th Cir. 1995)	25
Jefferson v. City of Tarrant, 522 U.S. 75 (1997)	6
Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990)	21
Judicial Watch, Inc. v. United States DOE, 207 F.R.D. 8 (D.D.C. 2002)	22

Cited Authorities

	Page
Kalinoweski v. E.I. Du Pont De Nemours & Co., 851 F. Supp. 149 (E.D. Pa. 1994)	25
Lescs v. Dow Chemical Co., No. 94-0091, 1995 U.S. Dist. LEXIS 21654 (W.D. Va. June 5, 1995)	25
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	19
Madruga v. Superior Court, 346 U.S. 556 (1954)	6
Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993)	22
Mathews v. Eldridge, 424 U.S. 319 (1976)	10
McBride v. Galaxy Carpet Mills, Inc., 920 F. Supp. 1278 (N.D. Ga. 1995)	24
McGautha v. California, 402 U.S. 183 (1971)	16
Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963)	9, 10
Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997)	25
Minneapolis, Saint Paul & Sault Ste. Marie. Ry. Co. v. Rock, 279 U.S. 410 (1929)	8
Mobil Corp. v. Adkins, 123 S. Ct. 346 (2002)	11
In re N. Dist. of Cal. Dalkon Shield Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982)	22

Cited Authorities

	Page
N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	10
Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003)	8
Norfolk & W. Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003)	25
N.Y. Life Ins. Co. v. Head, 234 U.S. 149 (1914)	24
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)	2
Pacific Mut. Life Ins. Co.v. Haslip, 499 U.S. 1 (1991)	16, 17
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	26
Parsons v. Bedford, 3 Pet. 433 (1830)	17
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	5, 19, 22, 23, 24, 25
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	7
Republic Natural Gas Co. v. Okla., 334 U.S. 62 (1948)	10
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995)	8
State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003)	5, 16, 17, 18
United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966)	22
Virginian Ry. Co. v. Mullens, 271 U.S. 220 (1926)	8

Cited Authorities

Page

STATE CASES

Davis v. Celotex Corp., 187 W. Va. 566, 420 S.E.2d 557 (W. Va. 1992) 25

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Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979) 24

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (W. Va. 1979) 7

Marlin v. Bill Rich Constr., Inc., 198 W. Va. 635, 482 S.E.2d 620 (W. Va. 1996) 25

Mayles v. Shoney's, Inc., 185 W. Va. 88, 405 S.E.2d 15 (W. Va. 1990) 28

McKinney v. Fairchild Int'l, Inc., 199 W. Va. 718, 487 S.E.2d 913 (W. Va. 1997) 22-23

Nicolet, Inc. v. Superior Court, 224 Cal. Rptr. 408 (Cal. Ct. App. 1986) 24

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Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (Pa. 1996) 25

State ex rel. Allman v. MacQueen, 209 W. Va. 726, 551 S.E.2d 369 (W. Va. 2001) 3, 10, 19, 26

Cited Authorities

Page

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State ex rel. Appalachian Power Co. v. Ranson, 190 W. Va. 429, 438 S.E.2d 609 (W. Va. 1993) 3

State ex rel. Mobil Corp. v. Gaughan, 211 W. Va. 106, 563 S.E.2d 419 (W. Va. 2002) 3, 5, 11, 23

Todd-Stenberg v. Dalkon Shields Claimants Trust, 56 Cal. Rptr. 2d 16 (Cal. Ct. App. 1996) 22

Tolley v. ACF Industries, Inc., 212 W. Va. 548, 575 S.E.2d 158 (W. Va. 2002) 27

Union Pac. Res. Group, Inc. v. Hankins, 51 S.W.3d 741 (Tex. Ct. App. 2001) 22

CONSTITUTIONS AND STATUTES

U.S. Const. Amend. V 20

U.S. Const. Amend. XIV 1, 20

28 U.S.C. § 1257 ..... 1, 6

W. Va. Code § 23-4-2 ..... 4, 11, 27, 28

W. Va. Code § 53-1-1 7

Cited Authorities

Page

RULES

Supreme Court Rule 14.1(g)(i) 6

Fed. R. Civ. P. 20 22

Fed. R. Civ. P. 23 ..... 8, 20

Fed. R. Civ. P. 42 ..... 20, 21

W. Va. R. App. P. 3 7

W. Va. R. App. P. 7 7

W. Va. R. App. P. 13 7

W. Va. R. App. P. 14 7

W. Va. R. Civ. P. 42 3

Trial Court Rule 26.01 ..... 2, 3, 4, 9, 11, 26

MISCELLANEOUS

John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 Seton Hall L. Rev. 698 (2001) 23

Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179 (2001) 20

Cited Authorities

Page

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595 (1997) 3

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RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation - An Interim Report* (2002) 2, 3, 5, 8

John A. Siliciano, *Mass Torts and the Rhetoric of Crisis* 80 Cornell L. Rev. 990 (1995) 3

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TABLE OF APPENDICES

Page

Appendix A – State Of West Virginia Ex Rel. Union Carbide Corporation, Petitioner v. The Honorable Arthur M. Recht, The Honorable Booker T. Stephens And The Honorable Alan D. Moats; All Plaintiffs In In Re: West Virginia Asbestos Personal Injury Litigation (Civil Action No. 02-C-9004 And 02-C-9005), *Order Refusing Writ Of Prohibition*, June 17, 2003 ..... 1a

Appendix B – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Phase 1 Order Of Honorable Booker T. Stephens*, Civil Action No. 02-C-9004, November 14, 2002, And In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Phase 1 Order Of Honorable Arthur M. Recht*, Civil Action No. 02-C-9004, November 19, 2002 ..... 3a

Appendix C – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Order Of Honorable Alan D. Moats*, Civil Action No. 02-C-9005, November 22, 2002, And *Order Of Honorable Alan D. Moats*, Civil Action No. 02-C-9005, January 3, 2003 ..... 8a

Appendix D – West Virginia Trial Court Rule 26.01: Mass Litigation Panel And Procedure ... 24a

Appendix E – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Trial Scheduling Order*, Civil Action No. 01-C-9000, February 26, 2002 ..... 29a

Appendices

Page

Appendix F – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Plaintiff's Joint Submission Of Common Issues To Be Tried Pursuant To Judge Gaughan's Order Of February 26, 2002* Civil Action No. 02-C-9004 ..... 43a

Appendix G – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Excerpts From August 12, 2002 Transcript*, Civil Action No. 02-C-9004, August 12, 2002 ..... 46a

Appendix H – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Excerpts From Phase 1 Trial Transcript*, Civil Action No. 02-C-9004, September 23, 2002 To October 24, 2002 .. 55a

Appendix I – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Judge's Charge To Jury*, The Honorable Booker T. Stephens, Civil Action No. 02-C-9004, October 24, 2002 ..... 66a

Appendix J – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Jury Interrogatories*, Civil Action No. 02-C-9004, October 24, 2002 ..... 91a

Appendices

Page

Appendix K – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Excerpt From Union Carbide Corporation's Memorandum In Support Of Motion For New Phase I Trial*, Civil Action No. 02-C-9004, And *Excerpts From February 21, 2003 Transcript*, Civil Action No. 02-C-9004 ..... 96a

Appendix L – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Order For Post-Trial Motions*, Honorable Booker T. Stephens, Civil Action No. 02-C-9004, March 11, 2003 .... 102a

Appendix M – In Re: West Virginia Asbestos Personal Injury Litigation, Circuit Court, Kanawha County, West Virginia, *Excerpts From Defendant Union Carbide Corporation's Motion For Relief From Order On Collateral Estoppel*, Civil Action No. 02-C-9005 December 11, 2002 ..... 104a

Appendix N – State Of West Virginia Ex Rel. Union Carbide Corporation, Petitioner v. The Honorable Arthur M. Recht, The Honorable Booker T. Stephens And The Honorable Alan D. Moats; All Plaintiffs In In Re: West Virginia Asbestos Personal Injury Litigation (Civil Action No: 02-c-9004 And 02-C-9005), *Excerpt From Petition For Writ Of Prohibition, Or In The Alternative, Petition For Appeal*, April 24, 2003 ... 108a

Appendix O – List Of Plaintiffs 113a

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The order of the Supreme Court of Appeals of West Virginia refusing petitioner's Petition For A Writ Of Prohibition, Or In The Alternative, For An Appeal is unreported (App. A at 1a). The order of the Honorable Booker T. Stephens embodying the jury's findings on the Phase I Products and Premises Trial is unreported (App. B at 3a). The orders of the Honorable Alan D. Moats granting collateral estoppel in the Phase I Deliberate Intent Proceedings is unreported (App. C at 8a).

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia treating petitioner's petition as being for a writ of prohibition and then refusing the writ was entered on June 17, 2003. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Union Carbide Corporation ("UCC") seeks a writ of certiorari to restore the due process rights that it was deprived of through the use of West Virginia's "mass trial" procedure for processing the ballooning number of asbestos personal injury claims on the dockets of West Virginia courts. The decision below is out of step with this Court's binding precedents and in conflict with the application of those precedents by other Federal and State courts. The important constitutional issues raised in this petition strike at the heart of a litigant's right to due process and the structure of our federal republic. This petition asks the Court to affirm that fundamental due process rights and principles of federalism apply regardless of the exigencies created by asbestos litigation, regardless of whether the case is heard in state or federal court and regardless of the label given to the aggregation.

A. Efficiency Trumps Fairness In West Virginia

The West Virginia judiciary has attempted to deal with the "elephantine mass of asbestos cases" through the adoption of innovative trial management procedures. *See State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 5-6, 479 S.E.2d 300, 304-05 (W. Va. 1996); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865-66 (1999). In particular, the West Virginia Supreme Court of Appeals ("Court of Appeals") adopted Trial Court Rule 26.01 ("Rule 26.01") in 1999. Rule 26.01 establishes the Mass Litigation Panel ("MLP") which is charged with the responsibility to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice." Rule 26.01(b)(1); App. D at 24a. Mass Litigation is defined as "two (2) or more civil actions pending in one or more circuit courts ... (b) involving common questions of law or fact in 'personal injury mass torts'...." Rule 26.01(c); App. D at 25a.

In their struggle with asbestos litigation due process rights have been destroyed. This problem has arisen because of the massive influx of plaintiffs who are unimpaired and have no connection to West Virginia and has been exacerbated by judicial interpretations of Rule 26.01 which render its fairness and commonality requirements nugatory.

Asbestos filings increased markedly in West Virginia in direct response to the Court of Appeal's apparent willingness to adopt "innovative" wholesale case processing mechanisms like mass trials. *See* RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation – An Interim Report* 32-37, 46 (2002) ("RAND Asbestos Report") (reporting that West Virginia was ranked second for the most asbestos filings between 1988 and 1997 behind only Texas and that non-malignant claims accounted for 80-90% of all claims filed during the period 1988 to 1997). Plaintiffs and their counsel, being rational economic actors, flocked to states like West Virginia which permitted

recovery *en masse* but reduced both the cost and the substantive standards of filing and proving claims. *Id.* at 26.[1]

Rule 26.01 was initially challenged in *State ex rel. Allman v. MacQueen*, 209 W. Va. 726, 551 S.E.2d 369 (W. Va. 2001) where the Court of Appeals held that "[b]ecause the provisions of TCR 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting various rules of civil procedure, including Rules 20, 23, or 42, which respectively address issues of joinder, class action, and consolidation." *Id.* at 731, 374. Further in *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 563 S.E.2d 419 (W. Va. 2002), *cert. denied*, 123 S. Ct. 346 (2002), the Court of Appeals rejected claims for application of settled West Virginia legal standards for consolidation, intended to promote efficiency and avoid prejudice and confusion,[2] to the Trial Scheduling Order entered on February 26, 2002 ("TSO") that established the framework for the Rule 26.01 mass trial the subject of this petition.[3] Most recently, when presented with actual, specific and concrete due process violations which occurred in the first

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[1] *See* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1010-11 (1995), arguing that the adoption of innovative solutions to mass torts rather than rigorously applying the ground-rules of the tort system creates delays and burdens the courts, ("The weak cases should not be allowed to free-ride on the strength of the [strong]."). *See also* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

[2] *See* Syl. Pt. 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W.Va. 429, 438 S.E.2d 609 (W. Va. 1993) ("The trial court, when exercising its discretion in deciding consolidation issues under W. Va. R. Civ. P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;").

[3] The Court of Appeals went on to argue that it had considered the need to group cases as mass litigation and the appropriateness of conjoining those cases based on common factual and/or legal issues. *See Gaughan*, 211 W. Va. at 112, 563 S.E.2d at 425. However, the administrative order that referred all asbestos cases to the MLP took place at a time where no specific trial structure existed and years before the completion of the trial the subject of this petition. It is ironic that the Court of Appeals refused to review the TSO on ripeness grounds and has now refused to review a completed trial, yet was willing to aggregate asbestos cases without any trial plan and without specifying the parameters of the aggregation.

completed trial subject to Rule 26.01, the Court of Appeals denied the requested writ of prohibition without opinion.

B. Union Carbide Was Denied Due Process And Federalism Requirements Were Disregarded

The standardless nature of Rule 26.01 and the resulting violations of due process and federalism are illustrated by:

1. the Phase I Products and Premises Liability Trial ("Phase I Trial"), a mass trial that aggregated all of the thousands of disparate product and premises liability cases filed against UCC before September 6, 2001; and

2. the Phase I Deliberate Intent Proceedings[4] ("Deliberate Intent Proceedings") where premises liability findings from the Phase I Trial were found to collaterally estop UCC defending phase I issues in the deliberate intent cases.

The Phase I trial began on September 26, 2002 and continued until October 24, 2002. The month long trial sought to determine whether UCC sold a defective asbestos containing product, whether UCC failed to maintain a safe workplace due to the presence of respirable asbestos fibers, whether UCC had engaged in a conspiracy and whether punitive damages should be awarded. The issues of causation and damages are scheduled for consideration by separate juries in later Phase II trials.

In fact, because of the unique circumstances of each of the plaintiff's exposure to asbestos – including time, location, conditions and duration of exposure – the trial devolved into a search for the lowest common denominator of whether asbestos, in general, was harmful. The mass trial procedure, while effective at coercing settlements, was incapable of dealing with complex product and premises liability actions lacking any reasonable semblance of the requirement of commonality and, as a result, denied UCC its basic

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[4] The 'deliberate intent' cause of action refers to the intentional infliction of harm exception to West Virginia's Workers' Compensation scheme. *See* W. Va. Code § 23-4-2(c) (2002) (Amended July 1, 2003, redesignating (c) as (d)).

constitutional right to be heard and to defend individual cases in a meaningful manner.[5]

To further force dissimilar cases through the mass trial assembly line the MLP decided to abandon West Virginia's choice of law rules requiring the application of the law of the place of the wrong and apply only West Virginia law in violation of the due process and federalism limitations set out in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Additionally, punitive damages were assessed by the Phase I jury without any evidence as to the relationship between the defendant's conduct and any specific or identified plaintiff's harm. The determination of punitive damages was also based on conduct outside West Virginia and violated the federalism limitations of *State Farm Mut. Auto. Ins. Co. v. Campbell* 123 S. Ct. 1513 (2003).

Lastly, to amplify the constitutional injury to UCC, the premises liability findings in the Phase I Trial were deemed to collaterally estop defense of the Deliberate Intent Proceedings despite the fact that UCC had not received a "full and fair opportunity" to litigate its liability under the deliberate intent statute in the earlier case.

C. The State Court Decision Is Final

A writ of prohibition challenging the TSO was brought before the Court of Appeals in *Gaughan* but was denied on ripeness grounds. The Court of Appeals reasoned that because the trial court had not finalized the common issues for the phase I trials nor definitively ruled on the use of a punitive damage multiplier any contention of a denial of due process was premature. *See Gaughan*, 211 W. Va. at 113, 563 S.E.2d at 426.

The procedural setting for this appeal, discussed in detail below, is very different from that in *Gaughan*. The purported

[5] The prejudice created by the mass trial is not limited to UCC. The truly sick plaintiff cannot be compensated due to unimpaired plaintiffs soaking up limited resources and bankrupting corporations. *See* RAND Asbestos Report at 71-74 (noting that between January 1, 2000 and July 2002, defendants spent $23 billion on asbestos litigation, there were at least 22 asbestos-related bankruptcies in the same time period, and the cost of "litigation will result in some reduction in investments and job creation").

common issues have not only been identified, they have been tried and a jury verdict rendered. A choice of law analysis violative of due process and federalism took place and governed the Phase I Trial. The punitive damages multiplier has been determined by the Phase I Trial jury. In the Deliberate Intent Proceedings collateral estoppel was applied incorrectly and now governs those proceedings. Further, a writ of prohibition on the above issues was sought from the Court of Appeals and has been denied. The threatened due process violations have now been realized, subject to review on post-trial motions and a writ of prohibition, and are not subject to amelioration or change in the Phase II trials.[6]

For a State Court decision to be reviewable by this Court under 28 U.S.C. § 1257, a state-court judgment must be final in two senses: (1) it must be subject to no further review or correction in any other state tribunal; (2) it must be final as an effective determination of the litigation. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). A petition for a writ of prohibition filed before the highest court of a state is a distinct lawsuit that is finally determined even if further proceedings are to be had in the lower court. *See Fisher v. District Court*, 424 U.S. 382, 385, n.7 (1976). *See also Bandini Co. v. Superior Court*, 284 U.S. 8, 14-15 (1931); *Madruga v. Superior Court*, 346 U.S. 556, 557 n. 1 (1954); Robert L. Stern, *et al.*, *Supreme Court Practice* 159 (8th ed. 2002).

UCC phrased its petition to the Court of Appeals in the alternative – Petition For A Writ of Prohibition, Or In The

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[6] Supreme Court Rule 14.1(g)(i) requires the petitioner to specify from the record of proceedings in the state trial and appellate courts when and how the federal questions were raised and passed upon. Questions 1 to 3 were raised and ruled on at the MLP's August 12 hearing (*See* App. G at 48a – 54a), and in UCC's Motion For New Phase I Trial (*See* App. K at 96a – 97a, 100a – 101a), which was denied by an Order dated March 11, 2003 (*See* App. L at 102a). Question 4 was raised in UCC's Motion For Relief From Order on Collateral Estoppel (*See* App. M at 104a), which was denied by an Order dated January 3, 2003 (*See* App. C at 11a). All questions were raised in UCC's Petition For a Writ of Prohibition, Or In The Alternative, Petition for Appeal (*See* App. N at 108a), which was denied by an Order entered on June 17, 2003 (*See* App. A at 1a).

Alternative For An Appeal[7] - as Judge Moats had found the Phase I Trial final for purposes of collateral estoppel. *See* App. C at 21a - 22a. However, UCC argued that its petition was properly a writ of prohibition as the trial court had "exceeded its legitimate powers" by conducting the Phase I Trial in contravention of settled due process rights and principles of federalism.[8] The Court of Appeals' Order treating UCC's petition as a writ of prohibition and then denying it is therefore final.[9]

Alternatively, if the Court of Appeals treatment of the petition below as one for a writ of prohibition is unavailing, this petition presents one of the "very few situations" where adherence to a "mechanical rule" for finality would create "economic waste and delayed justice." *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124-25 (1945). Indeed, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases where "the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Id.* at 477. Most applicable here is the fourth category that covers cases in which (1) "the federal issue has been finally decided in the state courts," (2) "the party seeking review . . . might prevail on the merits on nonfederal grounds" rendering review unnecessary,

[7] Appellate review in West Virginia may be sought through an appeal, a certified question or by extraordinary writ. *See* W. Va. R. App. Proc. 3, 13 and 14 respectively. All appellate review is at the discretion of the Court of Appeals. *See* W. Va. R. App. Proc. 7, 13(f) and 14(b).

[8] In West Virginia a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1 (2003). *See* Syl. Pt.1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (W. Va. 1979) ("this Court will use prohibition . . . to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate. . . .").

[9] Functionally the Court of Appeals' treatment of UCC's petition as a writ and then denying it creates the extraordinary situation where Judge Moat's ruling is allowed to stand and UCC is estopped from defending the Deliberate Intent Proceedings but UCC is denied the opportunity to challenge the underlying findings in the Phase I Trial that grounded the estoppel.

(3) "reversal of the state court on the federal issue would be preclusive of any further litigation," and (4) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83; *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2562 (2003) (Breyer, J., dissenting).

First, the Court of Appeals is the highest court in West Virginia and it finally decided the federal questions raised here when it exercised its discretion to deny UCC's writ of prohibition. *See Minneapolis, Saint Paul & Sault Ste. Marie. Ry. Co. v. Rock*, 279 U.S. 410, 412 (1929); *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926) (denial of discretionary review by appellate court is final).

Second, the fourth category seeks to ensure that cases containing important federal issues are not lost due to the potential for the issues to be mooted on state law grounds. *See Cox*, 420 U.S. at 478-479. Here, the opportunity for review may be lost because UCC could prevail after years of Phase II mini-trials on state causation grounds. Although *Cox* speaks in terms of prevailing on the merits, the pressure to settle should also be taken into account in the mass tort context where there are significant risks in defending the thousands of claims brought against UCC, especially where punitive damages have been preordained in some of those cases.[10] In addition, this case also fits the more traditional mold of cases where certiorari has been granted because of the importance of reaching constitutional issues even though the petitioner could prevail on the merits. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-180 (1988) (finality found even though petitioner could have prevailed on state grounds regarding the safety of a work site and avoided paying damages because "the unreviewed decision of the [state] Supreme Court might seriously erode federal policy.").

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[10] The development of class action certification review provides a relevant analogy as writs of mandamus have been granted to review certification because of the resulting "intense pressure to settle" and because by the time a final judgment is entered "it will come too late to provide effective relief to the defendants ... [because of] the sheer magnitude of the risk to which the class action ... exposes them." *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1298 (7th Cir. 1995). *See also* Fed. R. Civ. P. 23(f), advisory committee notes; RAND Asbestos Report at 35.

Third, a decision by this court on the constitutionality of the Phase I Trial's aggregation, choice of law and punitive damages procedures will end the use of the mass trial in the format adopted here. The due process and federalism violations encompassed by this petition are inherent in the mass trial procedure. Invalidating the collateral estoppel ruling in the Deliberate Intent Proceedings will end the misapplication of collateral estoppel.[11]

Fourth, failure to immediately review the due process and federalism issues raised by this petition creates a dangerous precedent that allows "innovative" but unconstitutional trial management procedures for asbestos litigation to go unchecked. It also tears at the fabric of our federal system. Through Rule 26.01 mass trials the West Virginia judiciary has encroached upon the sovereignty of other states by ignoring this Court's federalism precedents regarding choice of law and punitive damages. Thus, federalism affirmatively requires this Court to stop West Virginia's intrusion in other states' affairs.

Additionally, "it serves the policy underlying the requirement of finality" to determine issues now rather than subject parties "to long and complex litigation which may be all for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).[12] UCC will have to litigate Phase II trials on product liability and premises liability against 10 plaintiffs each month.[13] There

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[11] The underlying asbestos cases would still need to be resolved pursuant to a constitutional trial procedure, similar to *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), where the procedure used in a pre-trial seizure was unconstitutional, but further proceedings not inconsistent with this Court's ruling could take place. *See Fort Wayne Books, Inc. v. Indiana*, 539 N.E.2d 948, 948-949 (Ind. 1989).

[12] Preventing the parties from wasting more of their time and money litigating claims through an unconstitutional "mass trial" procedure will mean that the saved resources will be available to be fairly dispersed through a constitutional procedure that allows juries to distinguish the truly sick plaintiffs from those that are unimpaired.

[13] Judge Recht has entered a trial scheduling order for the premises liability cases requiring trials of 10 plaintiffs each month except for July

(Cont'd)

are likely to be thousands of claims at issue that will take decades to resolve.[14] The federal questions that currently co-exist in this petition will be fragmented if UCC is required to file an appeal after the completion of the Phase II premise liability cases, the Phase II product liability cases, and yet another appeal after the completion of the Phase II deliberate intent cases creating the type of piecemeal review that the finality requirement was designed to prevent. *See N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). Waiting until the end of this process defies the policy of judicial efficiency that both the *Cox* and *Langdeau* exceptions attempt to achieve.

D. Procedural History

1. Referral of Asbestos Cases to the MLP

On November 17, 2000, all "asbestos-based personal injury cases in West Virginia" were referred to the MLP. *Allman*, 209 W. Va. at 729, 551 S.E.2d at 372. The next month, those pending asbestos cases were transferred to Judge MacQueen. On May 23, 2001, Judge MacQueen planned a series of group trials containing between 20 and 100 plaintiffs each. *Id.* In July 2001, the West Virginia Supreme Court rejected Judge MacQueen's plan and held that *all* of the thousands of pending asbestos trials should commence no later than July 1, 2002. *Id.* at 734, 377. Three days later, Judge Martin Gaughan was appointed the supervising judge for all asbestos litigation.

(Cont'd)

and December. Judge Recht has indicated he expects to do the same for the product liability cases although he may increase the number of plaintiffs per trial if he believes it is manageable. The product and premises trials may be tried concurrently if sufficient judicial resources are available.

[14] The bifurcation and aggregation of the mass trial at issue here distinguish the instant petition from those cases where liability has been determined, but the amount of damages is yet to be adjudicated, leading to a lack of finality (*See, e.g., Bruce v. Tobin*, 245 U.S. 18 (1917)), because here the phase II trials have been severed, are not part of the main case and UCC would be irreparably injured if review were unavailing. *See Republic Natural Gas Co. v. Okla.*, 334 U.S. 62, 68 (1948); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (stating that finality requirements should be construed to avoid irreparable injury where possible).

2. Trial Scheduling Order

On September 6, 2001, Judge Gaughan ruled that he would conduct a single "mass trial" of all asbestos claims. The TSO set out a procedure citing Rule 26.01 that required the aggregation of all asbestos-related cases pending between the parties as of September 6, 2001 and set a trial date of September 23, 2002. *See* TSO attached as App. E at 31a.

The procedure outlined in the TSO involved two stages:

> Stage A – simultaneous mass trials[15] to determine the fault or liability of defendants based upon whether the cause of action is a:
>
> 1. product liability claim.
> 2. premises liability claim.
> 3. claim by an employee against his or her employer under the provisions of W. Va. Code § 23-4-2 (deliberate intent).
>
> Stage B – mini-trials using new juries to determine causation and damages.

See App. E at 31a – 34a.

The juries deciding the product and premises liability claims in stage A were also to determine if the defendants' conduct warrants punitive damages. *See* App. E at 31a.

3. Mobil's Request for Relief from the TSO

On December 21, 2001, Mobil Corporation, one of an estimated 250 defendants subject to the TSO, filed a petition for a writ of prohibition seeking relief from Judge Gaughan's September 6, 2001 ruling and the TSO which UCC joined and the Court of Appeals denied. *See Gaughan*, 211 W. Va. at 113-14, 563 S.E.2d at 426-27. Mobil Corporation filed a petition for writ of certiorari with this Court which was denied on October 7, 2002. *See Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002). UCC filed a Brief in Support of the petition.

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[15] At the time the TSO was entered it was assumed that there would be separate juries addressing the products, premises and deliberate intent cases. That was not to be, however, and the product and premises cases were collapsed into one jury trial a week before they commenced. *See* App. H at 56a.

4. Pre-Trial Rulings

On July 9, 2002, Judge Recht replaced Judge Gaughan as the Supervising Judge to preside in asbestos cases referred to the MLP and Judge Stephens replaced the resigning Judge MacQueen.

In July 2002 the plaintiffs filed their proposed common issues for the mass trial. *See* App. F at 43a. UCC opposed the common issues on due process and federalism grounds.

At a hearing on August 12, 2002, the MLP (Judges Recht, Stephens and Moats presiding) made the following rulings:

1. the deliberate intent cases would be rescheduled to December 2, 2002 as they involved "different standard[s]" compared to the premises cases. *See* App. G at 47a - 48a, 54a;
2. the premises and product liability trials would include a punitive damages multiplier. *See* App. G at 50a;
3. West Virginia law would apply to all claims in the Phase I Trial. *See* App. G at 53a - 54a; and
4. the plaintiffs' common issues numbered 1 through 7 were adopted as the issues for the product liability trial. *See* App. G at 54a. Judge Recht subsequently adopted the plaintiffs' questions listed as numbers 12 and 13 for the premises liability cases.

At the same time as preparations for trial continued, an estimated 250 defendants settled. On September 23, 2002, at a hearing on motions in limine, Judge Recht and Stephens collapsed the products and premises trials and required that they be tried together in one court room because all of the premises defendants had settled except UCC. *See* the Phase I Trial transcript attached at App. H at 56a - 57a. UCC's counsel objected to trying the two cases together but was told that it was to occur "purely for judicial economy." *See* App. H at 57a - 61a.

5. The Phase I Trial – Products and Premises

The Phase I Trial commenced on September 26, 2002 and involved numerous plaintiffs who alleged claims against UCC, Mobil Corporation and Amchem Products, Inc. under a theory of product liability, and against UCC alone for a conspiracy to commit fraud and on a premises liability theory.[16]

(i) Product Liability

The product liability claims against UCC were based on the mining and milling by UCC of a uniquely pure, short fiber variety of chrysotile asbestos known as "Calidria" from about 1963 to 1985. Calidria asbestos was produced in small volumes and had been used as a filler, reinforcing agent, opacifier, and thickening agent in such products as drywall patching compounds, plastics, and paints. The issues in the products trial, as plaintiffs framed it, were whether UCC Calidria was a defective product and whether UCC inadequately warned about the dangers of its product. The plaintiffs' approach was essentially to prove that 'generic' chrysotile asbestos was capable of causing harm to humans.

UCC adopted a two-prong defense to the product liability claims. First, it argued that Calidria's unique physical characteristics (short fibers) and chemical composition (lack of tremolite contamination) meant that it does not cause asbestos-related disease. *See* Testimony of Dr. Allen Gibbs, App. H at 63a and Testimony of Dr. Victor Roggli, App. H at 65a.

Second, UCC argued that as a raw material supplier who sold only to manufacturers and not end-users, it discharged its duty to warn about the hazards of asbestos through issuing warnings, material data sheets and toxicology reports to its customers – the product manufacturers - in relation to Calidria. The evidence of UCC's warnings to its customers was unchallenged.

(ii) Premises Liability

The premises liability claims focused on UCC's liability to employees of contractors as a premises owner and whether

[16] Amchem sought judgment as a matter of law and was dismissed due to a lack of evidence. Mobil settled the claims against it shortly after the motions for judgment as a matter of law were decided.

there was a dangerous condition at any of a large number of facilities over a 50-year period. The plaintiffs' approach was to point out in the most general terms, and in the most egregious of circumstances, the harm that asbestos can cause.

After motions for judgment as a matter of law, the premises at issue were five large and disparate West Virginia plants at South Charleston, Institute, Alloy, Technical Center, and Sistersville, and a plant at Marietta, Ohio.[17] In putting on its premises defense, UCC was forced to defend 6 entire plants - each plant, and each discrete work site within each plant, containing different asbestos products (or none at all) at different times. Further, the warnings on those various products, the types and availability of protection, the historical response to the use and/or removal of asbestos from the premises, the work conducted, and whether the work was conducted by employees or contractors also varied. To attempt to address those variations UCC presented evidence of its industrial hygiene policies and that the contractor was contractually responsible for the protection of its employees.

(iii) Jury Verdict

The jury was charged on October 22, 2002 and received a set of special jury interrogatories to answer. A copy of the charge is attached (App. I at 66a) and a copy of the interrogatories is attached (App. J at 91a).

The jury rendered its verdict on October 24, 2002. In the products liability case the jury found for UCC on the conspiracy and punitive damages claims. However, the jury found Calidria to be defective from 1964 to 1972. In the premises case the jury found that: (1) the premises of UCC in aggregate were "unreasonably dangerous due to the presence of breathable asbestos fibers in the workplace," from 1945 to 1980 and (2) UCC was liable for punitive damages and imposed a three times compensatory damages multiplier. Judge Stephens entered the Phase I order embodying the jury's

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[17] UCC obtained judgment as a matter of law with regard to premises at Anmore, West Virginia; Indianapolis Speedway Plant, Indiana; New Martinsville, West Virginia; Paducah, Kentucky; and St. Mary's West Virginia on the basis that no evidence whatsoever was introduced to put these sites at issue.

findings on November 14, 2002, which was redated, for effective filing, November 19, 2002. *See* App. B at 3a.

6. Deliberate Intent Proceedings and Collateral Estoppel

On November 4, 2002, in reliance on the premises verdict in the Phase I Trial, an entirely different set of plaintiffs – UCC employees suing under the deliberate intent provisions of the West Virginia Workers' Compensation Act – moved the circuit court to collaterally estop UCC from "relitigating" certain issues in their suits. The Court granted plaintiffs' motion, finding that a judgment that contractors' employees had been injured through UCC's negligence was tantamount to a judgment that UCC had been guilty of deliberately intending injury to its own workers. *See* App. C at 8a.

7. The Phase I Trial – Post Trial Motions and Appeal

UCC filed post-trial motions on December 4, 2002. The post trial motions were heard and denied on February 21, 2003. *See* App. K at 96a and App. L at 102a. On April 24, 2003 UCC filed a Petition for Writ of Prohibition, Or In The Alternative, Petition for Appeal. The Court of Appeals refused the petition without explanation on June 17, 2003. *See* App. A at 1a.

REASONS FOR GRANTING PETITION

I. Requiring The Jury To Determine Punitive Damages Without Any Evidence Of The Relationship Between Union Carbide's Actions And Any Plaintiff's Harm Violates Union Carbide's Right To Due Process

In the Phase I premises liability trial the jury determined that UCC was liable for punitive damages and calculated a "punitive damages multiplier" applicable to any compensatory damages to be awarded in Phase II. Specifically, the jury found that UCC was liable for punitive damages in an amount of three times the compensatory damages for premises liability. *See* App. J at 94a. Thus, the jury adjudged punitive damages without hearing any evidence of harm to any specific plaintiff.[18]

[18] The jury instructions stated "you have not heard evidence concerning any of the individual plaintiffs or the injuries or compensation that any individual plaintiff may be entitled to receive". *See* App. I at 88a.

It is a fundamental proposition of due process that, in a legal system using trial by jury to determine the "sense of the community" as to whether to award punitive damages and in what amount, the jury must receive evidence of the relationship between the defendant's conduct and the plaintiff's harm. *See Day v. Woodworth* 54 U.S. 363, 371 (1852) ("the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case").

In *Campbell* this Court reversed a punitive damages decision that failed to align a defendant's conduct with the plaintiff's harm – "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell*, 123 S. Ct. at 1523. As the Court acknowledged, reprehensibility, the most important indicium of the reasonableness of a punitive damages award, necessitates an examination of the defendant's conduct (indifference or recklessness) together with the plaintiff's harm (physical or economic). *Id* at 1521. Although this Court phrased the determination of reprehensibility as a court's responsibility in reviewing a punitive damages award, it is first and foremost a jury decision. If the jury is to reach that decision in a reasoned manner rather than by one that is arbitrary and capricious – that is, in accordance with due process – then the same jury must be presented with evidence as to both conduct and harm. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) ("the Due Process Clause does not permit a State to classify arbitrariness as a virtue."). Similarly, in the criminal punishment context, this Court has "never . . . intimated that a State can, consistently with procedural due process, close the door to evidence relevant to the 'intelligent imposition of sentences' either by judges or by juries." *McGautha v. California*, 402 U.S. 183, 246-247 (1971) (Douglas, J., dissenting). This Court has also worried that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). If this concern is to have any hope of being alleviated, the jury must surely be told what that harm is.

This question goes to the role of the jury and procedural due process. *See Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting) ("*Post hoc* review tests only the amount of the award, not the procedures by which that amount was determined."). If the jury is to perform its function and not be a court room ornament then it must be supplied with evidence of both defendant conduct and plaintiff harm in reaching its decision. *See Jacob v. New York City*, 315 U.S. 752, 752-753 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts."); *See also Parsons v. Bedford*, 3 Pet. 433, 446 (1830). West Virginia's innovative determination of punitive damages violates this due process right because the jury received no evidence whatsoever of harm to any plaintiff.

II. Determination Of Punitive Damages Predicated On Premises Conditions At Out-of-State Facilities Violates The Principles Of Federalism Embodied In *State Farm v. Campbell*

The aggregation of six dissimilar premises for the determination of a single punitive damages multiplier means that the conduct at each site infects the determination of punitive damages at each other site.[19] The multiplier thus reflects a pseudo-average of harm and UCC is therefore punished for some conglomeration of non-existing conduct rather than even purporting to punish UCC for the conduct that harmed any specific plaintiff. *See Campbell*, 123 S. Ct. at 1523. The multiplier thus violates due process,[20] but because

[19] For simplicity the argument here is phrased in terms of the six chemical plants that were the subject of the Phase I Trial, however, the unfairness is greater than that as each plant contained a number of sites with conditions that varied hour-to-hour so that the aggregation means that punitive damages is even less conduct-specific.

[20] The determination of an aggregate punitive damages multiplier robs UCC of the opportunity to defend any individual claim contrary to the due process requirement of an opportunity to be heard. *See* Section III A. *infra*. *See also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (improper aggregation unfairly allows plaintiffs to litigate on behalf of fictional composite "perfect plaintiff").

it included out-of-state conduct at Marietta, Ohio, it also implicates federalism concerns, which are the focus of this question.

The punitive damages multiplier was applied to premises cases from Marietta, Ohio in disregard of this Court's holding in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 571-73 (1996) and *Campbell*, that principles of state sovereignty and comity prohibit a State from using economic sanctions to change conduct in other States. In *Campbell* this Court held that:

> Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside [the state] to other persons would require their inclusion, and, to those parties, the [state] courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

Campbell, 123 S. Ct. at 1522.

In the Phase I Trial the jury delivered a verdict as to liability and punitive damages that expressly took into account UCC's conduct at its Marietta, Ohio plant in relation to all non-employee workers, despite the absence of many of those workers from the trial.[21] The punitive damages determination did not follow this Court's teachings as to how to conduct a "proper adjudication." Namely, UCC was punished for the hypothetical claims of Marietta workers not included in the mass trial. *See Campbell*, 123 S. Ct. at 1523 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"). Further, "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). Punitive damages are aimed at

[21] Special Interrogatory No. 4 referred to the payment of punitive damages due to UCC's actions towards "non-employee workers . . . present on the sites owned by Union Carbide" rather than to the plaintiffs at the sites in issue at the trial. *See* App. J at 94a.

deterring future occurrence of conduct and therefore act as a form of regulation. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Federalism requires that West Virginia respect Ohio's right to regulate premises within Ohio. West Virginia through determining punitive damages for persons not before the trial court has impermissibly projected its law and policy judgments into Ohio.

III. To Clear Court Dockets Of Asbestos Claims West Virginia's Phase I Trial Violated Union Carbide's Right To Due Process And Principles Of Federalism

West Virginia has become a magnet state for the filing of asbestos cases and has attempted to deal with those cases through adopting the innovative solution of requiring the aggregation of all pending asbestos trials into one mass trial. *See Allman*, 209 W. Va. at 734, 551 S.E.2d at 377. The trial court in giving effect to the Court of Appeals' mandate conducted the Phase I Trial in studied indifference to the absence of common issues and the inevitable prejudice to UCC resulting from the trial court being unable or unwilling to distinguish between claimants, causes of action or defenses as it tried to homogenize the case in aid of case management. The clearest example of homogenization and efficiency triumphing over fairness was the complete disregard of choice of law requirements. The West Virginia mass trial format thus violated UCC's right to due process by preventing UCC from putting forward its defense in a meaningful manner, and ignored the constraints of our federal system as set out in *Shutts*.

A. Due Process Requires That Parties Have The Opportunity To Be Heard And Present Their Case At A Meaningful Time And In A Meaningful Manner.

"A fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* 380 U.S. 545, 552 (1965) (internal quotation marks and citations omitted). *See also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). An aggregation of cases

does not *per se* violate the requirement of due process. However, any form of aggregation must honor a party's right to due process so as not to violate the United States Constitution. In this case the aggregation did violate due process because the lack of commonality and prejudice meant UCC could not exercise its right to be heard.

The fact that this case was heard in a state court does not alter those due process rights. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. *See* U.S. CONST. Amends. V and XIV; *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 102 (1993); *California v. Ramos*, 463 U.S. 992, 1013-14 (1983). As a result, the Phase I Trial must be consistent with the protections of the United States Constitution to be valid.

B. West Virginia's Mass Trial Conflicts With Decisions of Other Courts That Require Common Issues And A Lack Of Prejudice To The Parties For An Aggregation To Be Allowed

A court can aggregate claims through various methods, such as class action, permissive joinder, and consolidation under Federal Rule of Civil Procedure 42 equivalents. *See* Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 182 (2001) ("[I]n the United States, there are a variety of devices for pursuing large-scale litigation."). However, regardless of the form of the aggregation minimal due process standards, ensured through commonality and a lack of prejudice to the parties, must be maintained.

In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the Court upheld an appellate court's decision to decertify an asbestos class intended to achieve a global settlement of current and future asbestos-related claims nationwide because it failed to satisfy the predominance of common questions of law or fact requirement of Rule 23(b)(3) which is intended to achieve efficiencies "without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615, 624. This Court highlighted the lack of commonality that made class certification inappropriate by citing the Third Circuit's findings

that the plaintiffs "were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. . . . Differences in state law . . . compound these disparities." *Id.* at 624, 636 (Breyer, J., concurring in part, dissenting in part). Nor could the class satisfy the adequacy of representation requirement which tends to merge with the commonality and typicality requirements that "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether . . . the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 626 n.20 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157, n.13 (1982)).[22] In short, the *sine qua non* of the requirements for class action certification is commonality and the avoidance of prejudice.

Commonality and a lack of prejudice also ensure consolidations do not fall below the floor of minimal due process. In Fed. R. Civ. P. 42(a), a common question of law or fact shared by all of the cases is a prerequisite and courts have the discretion to order separate trials to avoid prejudice pursuant to Fed. R. Civ. P. 42(b). Even when dealing with asbestos cases "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990).[23] Other federal and state courts also follow the practice

[22] Group litigation has historically required commonality and an alignment of interests to prevent prejudice although the methods for insuring commonality and lack of prejudice have changed over time. *See generally* Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. Rev. 514 (1980). The Phase I Trial rejected the lessons of history to process the asbestos claims filed in West Virginia. This Court has stated, "When the absent [common law] procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

[23] The Second Circuit also recognizes that certain criteria such as "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged" assist in directing a trial court's inquiry into ensuring commonality and lack of prejudice in aggregated asbestos trials. *Johnson*, 899 F.2d at 1285. The Phase I Trial did not meet any of these criteria.

of only consolidating cases where there is commonality and a lack of prejudice.[24] As a result, consolidation has not generally been favored in the mass tort context as "[i]ndividual issues may outnumber common issues. . . . No one set of operative facts establishes liability." *In re N. Dist. of Cal. Dalkon Shield Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982). *See also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996).

Similarly, plaintiffs' cases can only be properly joined under Fed. R. Civ. P. 20(a) if there is a question of law or fact common to all the plaintiffs and joinder is consistent with fairness to the parties. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 n.10 (1966) (superseded on other grounds by statute).[25]

Although each method's goal is to increase efficiency, every method also requires an assurance of commonality and lack of prejudice, regardless of whether one claim is to be joined under permissive joinder or 1000 claims are to be certified as a class.

C. The Disregard Of *Shutts* And Application Of West Virginia Law To All Claims Violates Horizontal Federalism, Encroaches on Other States' Sovereignty And Denies Union Carbide Due Process

West Virginia recognizes the doctrine of *lex loci delicti* so that "the substantive rights between the parties are determined by the law of the place of the injury." *McKinney v. Fairchild*

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[24] *See, e.g., Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d. Cir 1993); *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954); *Judicial Watch, Inc. v. United States DOE*, 207 F.R.D. 8 (D.D.C. 2002); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444 (D. N.J. 1998); *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623, 625 (E.D. Wisc. 1984); *Todd-Stenberg v. Dalkon Shields Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996); *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001). *See also* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2383 (West 2d ed. 1995).

[25] *See, e.g., Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1126-27 (2d Cir. 1970) ("Rule 20 . . . specifically vests in the district court the discretionary power to make such orders as may be required to prevent delay or prejudice"); *Arrington v. City of Fairfield*, 414 F.2d 687, 693 (5th Cir. 1969).

Int'l, Inc., 199 W. Va. 718, 727, 729, 487 S.E.2d 913, 922, 924 (1997). The MLP, at a hearing on August 12, 2002, disregarded the above case law and determined that West Virginia law would apply to all aspects of the Phase I Trial:

> We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don't know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of this trial.

See App. G at 53a.[26]

The trial court's decision violates horizontal federalism.[27] In *Shutts* the Supreme Court recognized the importance of choice of law to horizontal federalism when it held that the application of Kansas law to every claim in a class action suit where almost all the plaintiffs had no apparent connection to Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822. The Court stated that the constitutional limits on choice of law are not "altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the state proposes to adjudicate and which have little connection with the forum." *Id.* at 821. *See also In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals*, 288 F.3d 1012, 1020 (7th Cir. 2002). The *Shutts* decision is an attempt to prevent forum shopping and interference with other states' sovereignty. Without *Shutts*, a

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[26] The MLP may have recognized that any choice of law analysis would be fatal to the mass trial. *See Gaughan*, 211 W. Va. at 332, 563 S.E. 2d at 795 (Maynard, J., concurring) ("Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don't see how the trial court can tread safely through this judicial minefield.").

[27] Federalism has two dimensions, vertical federalism dealing with federal versus state law, and horizontal federalism involving the relationship between and among states. *See* John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 Seton Hall L. Rev. 698, 706 (2001).

state with an insubstantial interest in a dispute can bind the nation, unfairly resolving controversial issues for the rest of the nation. *See* Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 57-59 (1986). *See also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

State product-liability laws reflect fundamental decisions about how best to protect citizens from defective products, regulate the state economy, and structure the judicial system. Federalism protects the right of each state to resolve these fundamental decisions for itself.

From a due process perspective, for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. *See Shutts*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).[28] The trial court's failure to engage in a "significant contacts" analysis (or any other choice of law analysis) means that UCC is now required to defend cases arising from actions occurring outside of West Virginia and subject to different legal standards, by the standards set by West Virginia law.

The *Shutts* decision requires that there be a conflict between the forum law and that of the other jurisdictions connected to the suit for there to be an injury and, consequently, a violation of the constitutional limitations on choice of law. *See Shutts*, 472 U.S. at 816. This requirement is easily met here

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[28] Not surprisingly, the MLP's disregard for *Shutts* also conflicts with decisions from lower courts. In aggregated proceedings in which injuries have accrued nationwide, courts routinely engage in an "individualized choice of law analysis" with respect to each plaintiff's claims (*See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)) and apply forum law only if they can confirm that each claim has the necessary "significant contact" with the forum state. *See Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408, 414-15 (Cal. Ct. App. 1986); *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 831-32 (Minn. 1979); *See also McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1285 (N.D. Ga. 1995).

with the relevant states differing on the availability of the raw materials supplier doctrine,[29] the law on unimpaired plaintiffs,[30] and the standard for punitive damages.[31]

D. The Phase I Trial's Lack Of Common Issues, Prejudice To Union Carbide And Disregard of *Shutts* Violates Due Process And Principles of Federalism

The mass trial procedure, while effective at achieving settlements, was incapable of dealing with complex product and premises liability actions without denying UCC its basic constitutional rights. Rather than address the plaintiffs' individual circumstances, the different laws that applied to UCC's sale of a raw material (Calidria asbestos) that differed significantly from other asbestos fibers, or that UCC operated six distinct premises over the relevant 50 year time period, the trial court persisted with its "one-size-fits-all" approach.

The Phase I Trial glossed over the fact that each plaintiff had a unique claim regarding asbestos exposure, which allegedly occurred at different times, in different locations

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[29] West Virginia law does not recognize the raw materials supplier doctrine (sellers of unadulterated raw materials are not subject to liability for harm caused by defective design of an end-product in which the raw material is used) in relation to UCC's Calidria asbestos (*see* App. I at 80a - 81a), but the doctrine is recognized in Pennsylvania (*Kalinowski v. E.I. Du Pont De Nemours & Co.*, 851 F. Supp. 149, 157-59 (E.D. Pa. 1994)), Virginia (*Lescs v. Dow Chem. Co.*, No. 94-0091, 1995 U.S. Dist. LEXIS 21654, at **12-14 (W.D. Va. June 5, 1995)), and Ohio (*Jacobs v. E.I. Du Pont De Nemours & Co.*, 67 F.3d 1219, 1236 (6th Cir. 1995)), where significant numbers of plaintiffs allege exposure to Calidria.

[30] This court is familiar with the diversity in state court holdings on this issue from its decisions in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) and *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210 (2003). For instance, recovery is allowed in West Virginia (*Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 652, 482 S.E.2d 620, 637 (W. Va. 1996)) but it is not allowed in Pennsylvania (*Simmons v. Pacor, Inc.*, 543 Pa. 664, 676-77, 674 A.2d 232, 238 (Pa. 1996)).

[31] The standard in West Virginia is that a defendant acted with malice, engaged in wilful, wanton or reckless conduct or acted with criminal indifference of civil obligations affecting the rights of others. *Davis v. Celotex Corp.*, 187 W. Va. 566, 568-569, 420 S.E.2d 557, 559-560 (W. Va. 1992), *see* App. I at 86a. Yet under Ohio law, which should have governed UCC's facility at Marietta, Ohio, punitive damages can only be awarded for "actual malice." *See Preston v. Murty*, 32 Ohio St. 3d 334, 335, 512 N.E.2d 1174, 1175 (Oh. 1987).

(requiring the application of different states' laws in many cases), for different durations and under different exposure conditions. To demonstrate the loss of UCC's ability to meaningfully defend itself this Court need look no further than the jury finding that six of UCC's premises were all unsafe from 1945 to 1980 at every work site, at every hour of every day. *See* App. J at 91a.

An aggregation in these terms under the auspices of consolidation, joinder or class action is clearly contrary to the settled principles enunciated in the case law cited above. A legitimate aggregation requires an assurance of commonality and lack of prejudice. However, these principles are side-stepped by the creation of a new form of aggregation called the Rule 26.01 mass trial.[32] *See Allman* 209 W.Va. at 731, 551 S.E.2d at 374. Equally, a legitimate aggregation requires a significant contacts analysis to ensure that the state has sufficient interests so that the choice of law is neither arbitrary nor fundamentally unfair.

To disregard the settled requirements of due process and federalism is to dispense a "cattle-car" justice that disenfranchises all parties, is disingenuous to the jury and renders inaccurate judgments.

IV. The Collateral Estoppel Ruling On Deliberate Intention Violated Union Carbide's Due Process Right To Have A Full And Fair Opportunity To Litigate The Claim At Issue

This Court has said the Due Process Clause prohibits estopping parties who have not had a full and fair opportunity to litigate the claim at issue. *See Blonder-Tongue Labs, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) and *Parklane Hosiery*, 439 U.S. at 327 n.7 ("It is a violation of due process for

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[32] *See* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C.L. Rev. 527, 590 (2002), observing that restrictions on the innovative use of mass tort class actions would cause the locus of innovation and controversy to shift to other areas of procedural and substantive law. Rule 26.01 represents that shift. This petition provides this Court with the opportunity to state that its rulings on due process and federalism as they apply to aggregation techniques and choice of law apply regardless of the nomenclature used.

a judgment to be binding on a litigant who . . . has never had an opportunity to be heard."); *see also In re Asbestos Litig.*, 829 F.2d 1233, 1255 (3d. Cir. 1987); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982).

The legal standard in a premises liability action is not identical to the legal standard in a deliberate intent action, so that UCC's opportunity to be heard on the former does not amount to a hearing on the latter. In *Tolley v. ACF Indus., Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (W. Va. 2002) a deliberate intention action based on a claim of exposure to hazardous substances, the Court of Appeals in affirming summary judgment in the defendant's favor, stated plainly that the violation of "a generalized notion of providing a safe workplace . . . does not rise to the level of a 'deliberate intention' action." *Id.* at 557, 167; *see also Greene v. Carolina Freight Carriers*, 663 F. Supp. 112, 115 (S.D.W. Va. 1987) (discussing fact that the deliberate intention statute explicitly states that the standard "generally requiring safe workplaces" is insufficient to establish that cause of action). This language from *Tolley* makes explicit what was already apparent in prior deliberate intention case law, namely that other legal standards such as negligence cannot serve as a substitute for the unique statutory legal standard in a deliberate intention action.[33]

Indeed, the operative question in a deliberate intent action brought under W. Va. Code § 23-4-2(c)(2)(ii) (2002) is whether the employer deliberately intended to harm the specific employee.[34] To meet this statutory standard, each plaintiff is required to prove each of five different statutory elements set

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[33] The collateral estoppel ruling of Judge Moats further illustrates that efficiency trumps fairness in West Virginia when asbestos cases are involved. The MLP (including Judge Moats) initially severed the deliberate intent and premises cases because they involved "different standards," but that ruling was then ignored to remove the need for a trial of the deliberate intent cases. *See* App. G at 47a - 48a.

[34] Deliberate intent may also be proven under W. Va. Code § 23-4-2(c)(2)(i) (2002), but collateral estoppel was not granted on the grounds of this provision as interrogatory No. 4 in the Phase I Trial was in the disjunctive form allowing for punitive damages to be awarded for reckless conduct that is insufficient to prove deliberate intent. *See* App. C at 19a-20a.

forth in § 23-4-2(c)(2)(ii)(A)-(E).[35] *See Greene*, 663 F. Supp. at 115 ("the statute leaves no room for flexibility; the Legislature intended all five factors to be proven").

These five elements set a completely different standard for holding UCC liable to the employee plaintiffs than the general negligence standard the non-employee plaintiffs used to hold UCC liable in the premises liability trial. The jury finding in the Phase I Trial that the premises were "unreasonably dangerous" and that UCC acted "intentionally, oppressively, willfully, maliciously or in wanton or reckless conduct," cannot be forced to fit the deliberate intent standard. *See Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 92, 405 S.E.2d 15, 19 (W. Va. 1990) (stating that with the deliberate intent standard, "the Legislature intended to create a legislative standard for loss of [workers' compensation] immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct") (internal quotation marks and citation omitted).

In short, the court ignored that the class of plaintiffs, the duties owed to the class of plaintiffs, and the origin of the law upon which a judgment could be based - statutory versus common law - are completely different. Thus, because the operative legal standards are not identical as required for collateral estoppel, UCC simply has not had a full and fair opportunity to litigate the issue of whether under West Virginia law it deliberately intended to harm any specific employee.

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[35] The plaintiff must prove: (A) existence of a specific unsafe working condition presenting a high degree of risk and serious injury or death; (B) that the employer had a subjective realization of the existence of the unsafe working condition and of the high degree of risk and serious injury or death; (C) that the unsafe working condition was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of such employer; (D) that the employer nevertheless exposed the employee to such specific unsafe working condition intentionally; and (E) the employee suffered serious injury or death as a direct and proximate result of such specific unsafe working condition. W. Va. Code § 23-4-2(c)(2)(ii) (2002). For the purposes of collateral estoppel Judge Moats did not consider (E) as it would be the subject of phase II proceedings. *See* App. C at 20a.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — STATE OF WEST VIRGINIA EX REL. UNION CARBIDE CORPORATION, PETITIONER V. THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO. 02-C-9004 AND 02-C-9005), *ORDER REFUSING WRIT OF PROHIBITION*, JUNE 17, 2003

STATE OF WEST VIRGINIA

No. 030841

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th of June, 2003, the following order was made and entered:

State of West Virginia ex rel. Union Carbide Corporation,

Petitioner

vs.

The Honorable Arthur M. Recht, The Honorable Booker T. Stephens and The Honorable Alan D. Moats; All Plaintiffs in In Re: West Virginia Asbestos Personal Injury Litigation (Civil Action No. 02-C-9004 and 02-C-9005),

Respondents

On a former day, to-wit, April 24, 2003, came the petitioner, Union Carbide Corporation, by Albert H. Parnell and Elliot G. Hicks, Hawkins & Parnell, its attorneys,

and presented to the Court its petition praying for a writ of prohibition to be directed against the respondents, The Honorable Arthur M. Recht, The Honorable Booker T. Stephens and The Honorable Alan D. Moats; and All Plaintiffs in In Re: West Virginia Asbestos Personal Injury Litigation (Civil Action No: 02-C-9004 and 02-C-9005), Respondents, as therein set forth. Thereafter, on the 9th day of May, 2003, pursuant to a request for a response under Rule 14(b) of the Rules of Appellate Procedure, came the respondents, All Plaintiffs in In Re: West Virginia Asbestos Personal Injury Litigation (Civil Action No. 02-C-9004 and 02-C-9005), by Anne McGinness Kearse and E. Claire Xidis, Motley Rice, LLC; James F. Humphreys, J. David Cecil and James A. McKowen, James F. Humphreys & Associates; Theodore Goldberg, David P. Chervenick and Bruce Mattock, Goldberg, Persky, Jennings & White; Leslie Crosco, Hartley, O'Brien, Parsons, Thompson & Hill; and William K. Schwartz, Harvit & Schwartz, their attorneys, and presented to the Court their initial response thereto.

Upon consideration whereof, the Court is of the opinion that a rule should not issue. It is hereby ordered that the petition for writ of prohibition prayed for by the petitioner is hereby refused. Justice Davis disqualified.

A True Copy

Attest: s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX B — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *PHASE 1 ORDER OF HONORABLE BOOKER T. STEPHENS*, CIVIL ACTION NO. 02-C-9004, NOVEMBER 14, 2002, AND IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *PHASE 1 ORDER OF HONORABLE ARTHUR M. RECHT*, CIVIL ACTION NO. 02-C-9004, NOVEMBER 19, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

CIVIL ACTION NO. 02-C-9004

PHASE I ORDER

On the 23rd day of September, 2002, several thousand civil actions alleging personal injury from asbestos exposure consolidated for trial on the issues of product liability, premise liability and punitive damages came on for trial pursuant to various consolidation orders entered by the Supreme Court of Appeals of West Virginia and the various trial methodology and scheduling orders previously established by this Court.

On the 24th day of September, 2002, pursuant to various pretrial orders of this court, the Honorable Booker T. Stephens, Chief Judge of the Circuit Court of McDowell County sitting by designation the Honorable Arthur M. Recht, Chief Judge

of the Circuit Court of Ohio County began selecting a jury consisting of six persons and four alternates to be duly selected and sworn to try the issues between the parties.

On the 26th day of September, 2002, a jury having been empaneled, the parties proceeded with their opening statements and in due course the taking of evidence by their respective counsel.

The trial continued from day to day before the Honorable Booker T. Stephens and/or the Honorable Arthur M. Recht until October 22nd, 2002. On October 22nd, 2002 the Court proceeded to give instructions to the jury and the jury heard closing arguments of plaintiffs and closing arguments for counsel for the remaining defendant, Union Carbide Corporation, at the conclusion of which the jury retired to consider the evidence and their verdict. The jury continued deliberations on a day-to-day basis until October 24, 2002, which the jury returned its verdict in the form and language as revealed by a copy of the same entitled Interrogatories to Jury, Interrogatory Nos. 1 through 5, which said verdict was made a part of the record in these proceedings and filed on October 24, 2002, the same being signed by jury foreperson, Robert Douglas.

Having considered all of the above and based upon the findings made by the jury embodied in the responses given in Interrogatory Nos. 1 through 5 (a copy of said Interrogatories to Jury and Interrogatory Nos. 1 through 5 being attached hereto as Exhibit A), and the Court having received no objection from the parties as to the Jury's deliberation or their method in reaching the verdict, and the court further

considering the proposed trial final judgment orders submitted by counsel for the plaintiffs and counsel for the defendants, the Court does hereby HOLD, ORDER, ADJUDGE and DECREE as follows:

1. The Union Carbide premises were unreasonably dangerous due to the presence of breathable asbestos fibers in the workplace from 1945 to 1980.

2. Calidria, sold by Union Carbide Corporation, was a defective product from 1964 to 1972.

3. Defendant, Union Carbide Corporation, did not enter into an agreement to act with others to make material representations and omissions with specific intent to defraud or mislead regarding the hazards of exposure to asbestos fibers.

4. Defendant Union Carbide acted intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others which non-employee workers were present on the sites owned by Union Carbide, and should therefore pay punitive damages in an amount to be determined by multiplying compensatory damages by three.

5. During the sale of Calidria, Defendant Union Carbide did not act intentionally, oppressively, willfully, maliciously or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others.

Appendix B

It is further ORDERED that the objections and exceptions of any party to any adverse findings and rulings contained in this Order be and the same are hereby expressly preserved and reserved and every party shall be deemed to have objected and excepted to any ruling made by this Court embodied in this Order which may adversely affect that party.

Post trial motions shall be filed 10 days from the entrance of this Order. *All costs* of this action as to Phase I including *jury cost* shall be assessed to the defendant. Following the entrance of this Order the matter will proceed with Phase II of the action as previously structured.

The Clerk of this Court shall provide a copy of this Order to Anne Kearse, as representative counsel for the plaintiffs, Elliott G. Hicks, counsel for the defendant; Union Carbide, at their respective addresses as contained in the Court file, and Chief Judge Arthur M. Recht.

Enter: November 14, 2002

s/ Booker T. Stephens
JUDGE

Appendix B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

CIVIL ACTION NO. 02-C-9004

ORDER

It is hereby **ORDERED** that the Phase I Order entered on November 15, 2002, by Judge Booker T. Stephens shall have an effective filing date of November 19, 2002.

Entered this 19th day of November, 2002.

s/ Arthur M. Recht
Arthur M. Recht
Circuit Court Judge

APPENDIX C — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *ORDER OF HONORABLE ALAN D. MOATS*, CIVIL ACTION NO. 02-C-9005, NOVEMBER 22, 2002, AND *ORDER OF HONORABLE ALAN D. MOATS*, CIVIL ACTION NO. 02-C-9005, JANUARY 3, 2003

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

CIVIL ACTION NO. 02-C-9005

ORDER

On the 13th day of November, 2002 came the Plaintiffs, by liaison counsel, Anne McGinnes Kearse, and came the Defendants, by their respective counsel Elliot Hicks, counsel for Union Carbide Corporation, Hunter McGeary, Jr., counsel for American Electric Power, and David K. Hendrickson, counsel for Owens-Illinois, Inc. The Defendant, I.E. duPont de Nemours & Co., made no appearance by counsel. All parties were present pursuant to a hearing scheduled by the Court to hear arguments on motions pending before the Court.

The Court heard arguments by counsel regarding "PLAINTIFF'S MOTION FOR COLLATERAL ESTOPPEL TO PREVENT THE RELITIGATION BY UNION CARBIDE OF THE LIABILITY ELEMENTS OF DELIBERATE INTENT THAT WERE DETERMINED IN THE PREMISES LIABILITY TRIAL". Based upon the representations of

counsel, the Court finds that the doctrine of collateral estoppel is not applicable to estop the Defendant, Union Carbide, from making a defense to claims arising under W. Va. Code § 23-4-2-(c)(2)(i) but may be appropriately applied to estop the Defendant, Union Carbide, from relitigating elements of W. Va. Code § 23-4-2(c)(2)(ii) which were previously determined by a jury in the premises liability trial. The Court further ordered that if counsel for the Plaintiffs chose to proceed under W. Va. Code § 23-4-2(c)(2)(ii) as opposed to pursuing their claims under W. Va. Code § 23-4-2(c)(2)(i), and notified the Count in writing by 3:00 p.m. on Friday, November 15th, 2002, the motion for collateral estoppel would be granted.

On November 15th, 2002 at 2:55 p.m., liaison counsel for the Plaintiffs, Anne Kearse, notified the Court by letter (via facsimile), erroneously dated November 16th, 2002 of the Plaintiffs' intent to withdraw all claims under West Virginia Code § 23-4-2(c)(2)(i) currently pending against Union Carbide.

Therefore, the Court finds that the doctrine of collateral estoppel is appropriate as applied to Plaintiffs' cause of action against Union Carbide under W. Va. Code § 23-4-2(c)(2)(ii) and therefore, Plaintiff's motion is **GRANTED** with regard to such cause of action based on findings of fact and conclusions of law to be set out by order of the Court at a future date.

Counsel for the Plaintiffs are **ORDERED** to submit a proposed order including findings of fact and conclusions of law directly to the Court no later than the 2nd day of December,

Appendix C

2002. It is further **ORDERED** that counsel for the Defendant, Union Carbide, have until the 12th day of December, 2002 to respond to Plaintiff's proposed order.

The Clerk of the Court is directed to provide copies of this Order to Counsel of Record.

ENTER: 11-22-02

s/ Alan D. Moats
Judge

Appendix C

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

CIVIL ACTION NO. 02-C-9005

ORDER

On the 11th day of December, 2002 the Defendant, Union Carbide, by its counsel, submitted to the Court a Motion for Relief from Order on Collateral Estoppel. The Court has reviewed the Motion and now finds that the Motion should be and it hereby is **DENIED.**

The Clerk of the Court is directed to provide copies of this Order to Counsel of Record.

ENTER: 1-03-03

s/ Alan D. Moats
Judge

Appendix C

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

CIVIL ACTION NO. 02-C-9005

ORDER

This matter is before the Court on Plaintiffs' "Motion for Collateral Estoppel to Prevent the Relitigation by Union Carbide of the Liability Elements of Deliberate Intent that were Determined in the Premises Liability Trial" (Plaintiffs' Motion).

I. Procedural History

Pursuant to consolidation orders entered by the Supreme Court of Appeals of West Virginia, several thousand civil actions alleging personal injury claims from asbestos exposure were consolidated. These claims were divided into trial groups pursuant to trial methodology and scheduling orders issued by this Court. On September 23, 2002, the actions alleging products liability, premises liability, and punitive damages (hereinafter "Phase I") began against Defendant Union Carbide Corporation (hereinafter "UCC").[1]

1. Amchem Corporation and Mobil Corporation were also present as the trial began. Mobil Corporation and Plaintiffs reached a settlement during the trial. The Court granted Amchem Corporation's motion for directed verdict at the end of the Plaintiffs' case.

Appendix C

The actions alleging deliberate intent against UCC were scheduled to begin trial December 2, 2002.

On September 26, 2002, the parties proceeded with opening statements. The trial continued from day to day until October 22, 2002. At the end of the evidence, the Court instructed the jury on the law. The jury instructions addressed the issues of latent danger, foreseeability, severity of injury, normal expected use of premises, burdens of the parties, ability of UCC to take safety measures, and UCC's knowledge. *See* Plaintiffs' Motion, Exhibit 8 (Trial Transcript, Jury Instructions). On October 24, 2002, the jury returned the verdict form, which contained five special interrogatories. Special Interrogatory Number One asked,

> Do you find by a preponderance of the evidence that the Union Carbide Premises were unreasonably dangerous due to the presence of breathable asbestos fibers in the workplace?"

The jury answered "yes." Special Interrogatory Number One also asked,

> If your answer to this Interrogatory was "yes", please state the dates that such premises were unreasonably dangerous.

The jury answered, "1945-1980."

Special Interrogatory Number Four asked,

> Do you find from a preponderance of the evidence that, when non-employee workers were present

> on the sites owned by Union Carbide, Union Carbide acted intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages?

The jury answered "yes."[2] *See id.*, Exhibit 1 (Verdict Form). On November 19, 2002, the Court entered a "Phase I Order," which adopted the findings of the jury.

Plaintiffs filed a motion for collateral estoppel on November 6, 2002 seeking to have UCC collaterally estopped from relitigating issues in the deliberate intent case that were litigated and decided in Phase I. Defendant Union Carbide filed a response on November 12, 2002. This Court heard oral arguments on November 13, 2002.

II. Findings of Fact

The Court makes the following findings of fact:

1. Plaintiffs and UCC tried the case on all issues regarding workers' exposure to asbestos fibers and unsafe working conditions.

2. UCC presented testimony and documents regarding the conditions its employees worked in, its knowledge of asbestos

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2. Special Interrogatories Number Two and Number Five addressed the product liability case. Special Interrogatory Number Three addressed conspiracy.

hazards, its industrial hygiene practices, and industry standards.[3]

3. UCC stated that it would try the premises liability case by demonstrating how it treated its employees, and presented its case in that manner.[4]

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3. UCC's evidence included its testimony and documents about its industrial hygiene practices, work conditions for employees and contractors, and warnings. UCC also presented expert testimony about industry standards that protect "everybody" in the workplace. *See* Plaintiffs' Motion, Exhibit 11 (Trial Testimony of UCC Expert, Mr. Birkner); *See also*, Motion Hearing Transcript, p. 80.

4. UCC explained in its opening statement that it intended to demonstrate that the conditions in which contractors worked were safe by showing that the conditions its employees worked in were safe:

> I said that there are two basic groups. The first basic group are the employees, and they aren't involved. But the only way in which I can show you what we did with contractors is to show you how we treated our employees.
>
> . . .
>
> So the question comes did Union Carbide furnish a reasonably safe place to visitors or invitees, these contractors. Well for whom does it have to be reasonably safe? Obviously, for everyone, because if we are not protecting it for [our] employees we cannot possibly be protecting it for our invitees.

Plaintiffs' Motion, Exhibit 3 (Transcript of Opening Statements).

4. Plaintiffs presented documents and testimony regarding the working conditions in UCC's facilities, UCC's industrial hygiene practices, asbestos at UCC's facilities, UCC's knowledge of the risks of asbestos, and industry standards, for asbestos use.[5]

III. Conclusions of Law

The Court makes the following conclusions of law:

1. Collateral estoppel is appropriate to foreclose UCC from relitigating issues in the deliberate intent cases that were previously litigated and decided in Phase 1.[6] *See Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E. 2d 216, 220 (1983). Plaintiffs have satisfied the first two essential requirements for the application of offensive collateral estoppel: 1) the issues that will arise in the second case were actually litigated in the first case, and 2) the first judgment was rendered on

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5. *See* Plaintiffs' Motion, Exhibits 4,6,7 and 10. (Documents and testimony presented by Plaintiffs during Phase I trial).

6. The underlying public policy behind collateral estoppel is:

> [t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation [of] attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Footnote omitted.)

Conley v. Spillers, 171 W. Va. 584, 588, 301 S.E. 2d 216, 220 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-154 (1979).

the merits and was a final judgment by a court of competent jurisdiction over the subject matter and the parties. *See id.* (citing *Lane v. Williams*, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).[7] Plaintiffs have also satisfied the additional three elements of offensive collateral estoppel: 1) no substantial change has occurred in the controlling facts or legal principles since the earlier case; 2) no special circumstances exist that would warrant the conclusion that enforcement of the judgment is unfair, and; 3) it is not the case that plaintiffs could have easily joined first case, but failed to do so. *See id.* at 222-224.

2. Regarding relitigation of the same issues, the Court finds that the issues litigated and decided in Phase I are the same as the issues that would be litigated in deliberate intent claims brought pursuant to West Virginia Code § 23-4-2(c)(2)(ii), but not the same as the issues presented in deliberate intent claims brought pursuant to West Virginia Code § 23-4-2(c)(2)(i). The West Virginia Code provides that an employer will lose its immunity from tort claims only if a plaintiff can demonstrate deliberate intent. Deliberate intent may be satisfied only if:

> (i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately

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7. UCC cites several additional cases in their response. However, these cases address defensive collateral estoppel and are not as directly on point to the issues presented to the Court as the *Conley* case, which addresses offensive collateral estoppel, also referred to as issue preclusion.

formed intention to produce the specific result or injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or

federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working conditions intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. Va. Code § 23-4-2(c)(2)(i),(ii).

3. The Court finds that that collateral estoppel does not apply to any claims brought under subsection (i) of the deliberate intent statute. In Special Interrogatory Number Four, the jury was asked whether it found UCC "acted intentionally, oppressively, willfully, maliciously, *or* in wanton or reckless conduct *or* criminal indifference to civil obligations affecting

the rights of others" (emphasis added). Because the interrogatory was asked in the disjunctive form, using the term "or," this Court cannot determine which of these terms the jury believed accurately described UCC's actions. There is a possibility that the jury found UCC acted recklessly or willfully or wantonly, which West Virginia Code § 23-4-2(c)(2)(i) explicitly states is insufficient to demonstrate deliberate intent under that subsection. Therefore, the Court declines to apply collateral estoppel to claims brought under subsection (i).[8]

4. The next inquiry is whether the issues presented in subsection (ii) parts (A), (B), (C), and (D)[9] of the statute are the same issues that were litigated in Phase I. Regarding part (A), the Phase I jury's answer to Special Interrogatory Number One establishes that UCC's facilities were dangerous work environments due to the presence of asbestos fibers. Furthermore, as UCC's counsel advised the jury in opening statements, the way the premises liability case would be presented was by showing that nonemployee workers were treated the same as UCC's employees, and that UCC would defend the case by demonstrating the way employees were treated. UCC then presented the case in that manner.

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8. Plaintiffs informed the Court on November 15, 2002 that they withdrew all claims under W. Va. Code § 23-4-2 (c)(2)(i) currently pending against Union Carbide in civil action no. 02-C-9005.

9. The Court need only address (A); (B), (C), and (D) of subsection(ii) because part (E) of the statute would not be at issue in the liability phase of the case, but will be litigated in the damages phase.

Appendix C

The Court finds that the "presence of asbestos fibers" is a specific dangerous working condition and that the issue of a specific dangerous working condition was fully litigated and decided in Phase I.

5. As to part (B), the issue of subjective realization, the Court finds that this issue is the same as the issue of knowledge, which was fully litigated in Phase I. The parties presented evidence about UCC's knowledge, and the jury was instructed to consider UCC's knowledge in its determinations of Special Interrogatories One and Four.

6. As to part (C), violation of a standard or statute, the parties presented expert testimony regarding industry industrial hygiene standards as well as testimony from both independent contractors and UCC employees about the working conditions in the plants. The Court finds that part (C) was fully litigated in Phase I.

7. As to part (D), the Court finds that the jury instructions regarding knowledge and forseeability, combined with the jury's answers to Special Interrogatories One and Four and the evidence presented by the parties, demonstrates that part (D) was litigated and decided in the premises liability trial.

8. Plaintiffs have satisfied the second element for the application of collateral estoppel, that the first judgment was rendered on the merits and was a final judgment by a court of competent jurisdiction over the subject matter and the parties. The Phase I issues were tried on the merits and fully adjudicated as to liability. The Court entered an order adopting the findings of the jury on November 19, 2002.

Appendix C

For the purpose of collateral estoppel, "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. *See* Restatement of Judgments 2d § 13 (2002). The Court finds that the jury's decision in Phase I is sufficiently firm to be conclusive and is a "final judgment" for the purpose of collateral estoppel.

9. The Court finds that neither the substantial facts nor legal standards have changed since the decision in the premises liability case.

10. The Court finds no special circumstances exist that prohibit the application of collateral estoppel in this case.

11. The final factor to be considered in the application of offensive collateral estoppel is why a plaintiff in subsequent litigation did not join the earlier litigation.[10] The Mass Litigation Panel severed the deliberate intent claims from the premises liability claims and it was by order of this Court that the deliberate intent plaintiffs were not permitted to be present in Phase I. Under these circumstances, the deliberate intent plaintiffs should not be prohibited from exercising offensive collateral estoppel.

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10. As one of the purposes of collateral estoppel is to "limit repetitive litigation and encourage joinder," a trial judge should not allow the use of offensive collateral estoppel in cases where a plaintiff could easily have joined in the earlier action. *See Conley*, 171 W. Va. at 592, 301 S.E. 2d 223-224 (citing *Parklane Hosiery Co.*, 439 U.S. at 330-331).

Appendix C

12. The Court finds that Plaintiffs satisfy each element required for collateral estoppel to be applied to the deliberate intent action pending against UCC. Therefore, Plaintiffs' motion for collateral estoppel is GRANTED. UCC is hereby collaterally stopped from relitigating W. Va. Code § 23-4-2(c)(2)(ii)(A) – (D) and the deliberate intent cases against UCC shall proceed directly to the damages phase.

IT IS SO ORDERED.

s/ Alan D. Moats
The Honorable Alan D. Moats
Circuit Court Judge

January 03, 2003

APPENDIX D — WEST VIRGINIA TRIAL COURT RULE 26.01: MASS LITIGATION PANEL AND PROCEDURE

RULE 26. MASS LITIGATION

26.01 MASS LITIGATION PANEL AND PROCEDURE

(a) The Mass Litigation Panel shall consist of six (6) active or senior status circuit judges who shall be appointed by the Chief Justice, with the approval of the full court. Each shall serve on the Panel for a term of three (3) years, two (2) to be appointed each year. There shall be no prohibition against serving successive terms. The Chief Justice shall annually designate one of the members of the Panel to serve as its chairman to preside over the activities of the Panel and to report to the Supreme Court of Appeals.

(b) The Mass Litigation Panel shall have the following responsibilities:

1. To develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice;

2. To preside over actions referred to it by the Chief Justice and to provide assistance and guidance to any other circuit judge within the State upon assignment by the Chief Justice;

3. To make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel, and to request the assignment of additional circuit judges to assist in any activities that may be necessary to resolve actions or issues in actions that may be referred to the Panel;

4. To recommend rules for adoption by the Supreme Court of Appeals for the conduct of the business of the panel;

5. To report periodically to the Chief Justice concerning its activities; and

6. To take such action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by this rule or by the specific directive of the Chief Justice.

(c) "Mass litigation" shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common

questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

(d) Any coordinated or consolidated actions transferred pursuant to this rule shall be conducted by a member or members of the Panel and/or by a judge to whom the actions are assigned by the Chief Justice. Any member of the Panel or any circuit judge to whom actions are assigned under this rule shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting any proceedings consistent with the Panel's case management and trial methodologies.

(e) Any party, judge, or the Administrative Director of the Courts may seek a referral to the Panel for transfer of actions by filing a Motion to Refer to Mass Litigation Panel in any circuit court in which a qualified case is

pending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.

Said motion may be filed within six (6) months after the filing date of the case in which the motion is being filed; provided, however, that a judge or the Administrative Director may file said motion at any time, if it is determined that litigation qualifies as mass litigation and that the litigation may be resolved more expeditiously by reference to the Panel.

The motion shall be served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director. Any party shall have twenty (20) days after the motion is filed to file a reply memorandum stating its position and opposition, if any. Any affected judge may file a reply memorandum within ten (10) days thereafter.

After the response periods have expired, the judge of the court in which the motion was filed shall forward to the Chief Justice a copy of the motion and all reply memoranda filed in the case. Upon review of the motion and reply memoranda, the Chief Justice may act directly upon the motion or may direct the Panel to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule.

The Chief Justice shall act upon the motion within ten (10) days.

If the motion is referred to the Panel, the Panel or a designated member of the Panel shall hold a hearing to receive evidence and entertain arguments by the parties or any judge, and shall submit findings of fact and a recommendation to the Chief Justice. Said recommendation shall be provided to the Chief Justice within twenty (20) days from the date the matter was referred to the Panel.

The Chief Justice, whether acting directly upon the motion or upon the recommendation of the Panel, shall enter an order either granting or denying the motion, or by providing modified relief consistent with this rule within ten (10) days.

(f) The filing of a motion under subsection (e) of this rule shall not operate to stay discovery in any affected case in any instance or to delay a scheduled trial unless a stay of a trial is ordered by the Chief Justice.

(g) Nothing contained in this rule shall be deemed to affect the authority of a circuit judge to act independently under the provisions of W. Va. R. Civ. P. 42.

APPENDIX E — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *TRIAL SCHEDULING ORDER*, CIVIL ACTION NO. 01-C-9000, FEBRUARY 26, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION

CIVIL ACTION NO. 01-C-9000

TRIAL SCHEDULING ORDER

Pursuant to Rule 26.01 of the West Virginia Trial Court Rules and the West Virginia Rules of Civil Procedure, the following schedule is hereby ORDERED by the court in the above-styled civil action.

I. OVERVIEW

Several thousand asbestos personal injury claims are currently pending before this court. All of these cases have been pooled and referred to the Mass Litigation Panel for the development of a case management plan or plans. Historically, in West Virginia and other states which experienced large numbers of asbestos-related personal injury suits, the trial of individual cases or of small groups of cases has resulted in time-consuming and expensive relitigation of common issues. These problems have, in turn, prevented courts from disposing of their asbestos cases with the same

dispatch as their routine litigation and have caused inordinately high transaction costs which occasionally exceed the amounts recovered by injured plaintiffs.

In this state, over the past twenty years, the courts have developed a specialized approach to the asbestos personal injury litigation which has resulted in the prompt resolution of the cases in compliance with the requirements of Article 3, Section 17 of the West Virginia Constitution, and has reduced litigation costs to a fraction of what they would have been if the cases had been tried on a piecemeal basis. That approach has been to sever, for a single initial trial, the liability issues which are *common* to all pending cases. While counsel have referred to this process as a "consolidation," it is not and has not been a consolidation as contemplated by Rule 42 of the West Virginia Rules of Civil Procedure and the decisional law relating to that Rule.

Virtually all of the arguments advanced in opposition to this court's announced intention to continue to use the trial methodology which has proven so effective at disposing of tens of thousands of asbestos-related claims so quickly and inexpensively are directed toward a consolidation of large numbers of cases for trial on all issues – a method that the court has never contemplated. The West Virginia Supreme Court of Appeals has expressly approved a trial plan which is substantially identical to that which follows. *See State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996).

Appendix E

II. TRIAL DATE: SEPTEMBER 23, 2002

A. The trial format will be substantially identical to the previous consolidated "mass trials" which have been referred to as "Kanawha Mass I, Kanawha Mass II, and Mon Mass II." The object of any trials will be to obtain verdicts on the issues related solely to the fault of the defendants in three general types of causes of action asserted by the plaintiffs. Those causes of action are (1) product liability claims; (2) premises liability claims; and (3) claims by employees against their employers under the provisions of W. Va. Code § 23-4-2. Three trial groups shall proceed simultaneously before three juries in a manner which will (1) minimize the recitation of common evidence; and (2) allow counsel in each group to focus on defendant-specific evidence and avoid confusion of the jury. Further, in each trial group, except Group III, the jury will be asked to evaluate the conduct of each individual defendant to determine whether that conduct warrants awarding punitive damages and, if so, what ratio or proportion a punitive damages award should bear to any subsequent award of compensatory damages. All asbestos-related cases pending between the parties as of September 6, 2001, are subject to this Order.

1. Group I will consist of one trial to determine the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of a conspiracy, tortuous joint venture, or other tortuous combination with a manufacturer or distributor of asbestos-containing products. Specifically, interrogatories will be submitted to the jury for findings concerning whether and

for what time period any defendant manufacturers sold or distributed a defective asbestos-containing product or whether and for what time period any other defendant engaged in a conspiracy, tortuous joint venture, or other tortuous combination with a manufacturer or distributor of asbestos-containing products.

2. Group II will consist of one trial to determine the common issues of fault of all premises liability defendants. Premises liability defendants are those defendants against which a cause of action is asserted for failure to maintain a safe workplace. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant had actual or constructive knowledge that asbestos-containing materials used in the workplace posed a risk of harm to workers exposed to the materials.

3. Group III will consist of one trial to determine the common issues of fault of the employer defendants for actions by employees under W. Va. Code § 23-4-2. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant (1) prior to May 9, 1983, was guilty of misconduct of a willful, wanton, and reckless character and had knowledge and appreciation of the high degree of risk of physical harm to employees resulting from exposure to asbestos-containing products in the workplace; or (2) subsequent to May 9, 1983, had a subjective realization and appreciation that the use of asbestos-containing products without warnings or appropriate safety measures in the workplace created an unsafe working condition and a high degree of risk and a strong probability of serious injury or death presented by the unsafe working condition.

Appendix E

4. The presiding Judge and two other Judges to be designated from the Mass Litigation Panel shall begin the trials described in subparagraphs 1-3 above by selecting three juries. The trials shall proceed simultaneously and, as necessary to avoid the presentation of repetitive evidence, the Judges may convene all juries together to hear common witnesses and receive common evidence.

5. The court recognizes that the parties are engaged in active settlement discussions, and that historically, large numbers of claims have been resolved in advance of the scheduled trials. If, in the judgment of the presiding Judge, sufficient numbers of defendants have reached complete settlements of all pending claims prior to trial, the trials on all the issues identified in subparagraphs 1-3 above may be held before a single jury.

6. Any verdicts returned in the three trial groups ("Groups I-III") shall be deemed to constitute a verdict on the relevant issues in all asbestos personal injury litigation which has been referred to the Mass Litigation Panel by the Supreme Court of Appeals pursuant to Trial Court Rule 26.01.

7. Once verdicts are returned on the issues related solely to the fault of the defendants as described above, the jurors picked in Groups I-III will be dismissed. New juries will be impaneled for mini-trials which will be conducted to determine causation and damages. These mini-trials will begin four weeks after verdicts are rendered in Groups I-III. The mini-trials will consist of a number of plaintiffs against their common defendants. The preferred manner of addressing the causation and damages issues will be to break

the parties down into manageable groups based on causes of action, geographic locations, and similar exposure criteria. At the beginning of each mini-trial, the Judge will read the verdict forms from the previous trials, including all special interrogatories and jury findings on each interrogatory, to the new jurors. The Judge will also advise the new jurors that they are bound by the decisions of the other juries and that they will only consider individual causation and damages.

8. Within two weeks after verdicts are reached in Groups I-III, a scheduling conference will be held for the causation and damages mini-trials.

B. The court never considered and hereby rejects a proposal for use of a matrix developed by utilizing depositions and findings of a master as the basis for the sample. The court will consider, however, the appropriateness of the use of a matrix constructed from actual jury verdicts, depending upon the type and number of cases remaining after verdicts are rendered in Groups I-III. At the current time, a workable plan for utilizing a matrix is *not* before the court, and there is no need to take evidence on the use of a matrix until at least the scheduling conference for the causation and damages mini-trials. By that time, the court anticipates that it will be able to ascertain the necessity of implementing such a matrix based on the type of cases and the number of plaintiffs and defendants remaining in the action.

C. The matrix alternative will be used only if necessary to maintain the mandate of utilizing a jury system as required by Article 3, Section 13 of the West Virginia Constitution

while also adhering to Article 3, Section 17 which requires that justice be administered without denial or delay. If it is determined by a jury or juries that the defendants have damaged many plaintiffs, and if the court determines that, by virtually all of the same activities, the defendants have injured plaintiffs so numerous that the plaintiffs will be denied their right to justice without excessive delay, then the court may be compelled to adopt a matrix based on actual jury verdicts to provide the parties their guaranteed access to justice.

III. MOTIONS:

A. All parties must file any pre-trial motions under Rule 12 of the West Virginia Rules of Civil Procedure, including any dispositive motions, by *SEPTEMBER 5, 2002.* Any responses to dispositive motions must be filed no later than *SEPTEMBER 10, 2002.*

B. All motions attacking the venue or jurisdiction of the court MUST be filed by *MARCH 25, 2002* or they will be waived. Parties opposing such motion(s) must file their written responses no later than *APRIL 8, 2002.* No such motion(s) shall be filed if already ruled upon in this action. Hearing on said motions will be held on *APRIL 11, 2002.*

C. Motions for summary judgment may be filed by *AUGUST 29, 2002*, if discovery on the individual case warrants it.

D. All motions in this case shall be filed with the Kanawha County Circuit Clerk's Office in Case No. 02-C-9004,

with a courtesy copy sent to the Honorable Martin J. Gaughan, Brooke County Courthouse, P.O. Box 474, Wellsburg, West Virginia 26070.

IV. DISCOVERY:

A. PLAINTIFFS' CERTIFICATION:

1. By *MARCH 8, 2002*, plaintiffs' counsel must certify to the court the identity of *all* plaintiffs remaining in the case by providing the following information for each remaining plaintiff: (1) name of plaintiff or plaintiff's decedent; (2) name of spouse; (3) plaintiff's address; (4) plaintiff's date of birth; (5) plaintiff's decedent's date of death, if applicable; (6) plaintiff's social security number; (7) asbestos-related disease/diagnosis alleged; (8) date of diagnosis; (9) plaintiff's occupation or trade; (10) name and address of premises where plaintiff worked; (11) place where plaintiff was residing when the alleged exposure to asbestos occurred; (12) name of plaintiff's employer at each premises; (13) trade and dates of employment at each site; (14) dates and places of alleged exposure to asbestos for each defendant; (15) identification of asbestos-containing products/ manufacturers to which each plaintiff was allegedly exposed at each premises (identify by product, premises, and dates of alleged exposure); (16) identification of those defendants against which each remaining plaintiff asserts a claim in this lawsuit; and (17) theory of liability for each remaining defendant.

2. Any plaintiffs not certified as described above will be dismissed from the case *with prejudice*.

3. Within ten (10) days after verdicts are rendered in Groups I-III, plaintiffs' counsel must again certify to the court (1) which plaintiffs remain in the case; and (2) who the remaining defendants are for each plaintiff.

B. DEFENDANTS' ACKNOWLEDGMENT:

1. All defendants must acknowledge which certified plaintiffs have actions pending against them by *APRIL 2, 2002*. The defendants must provide each such plaintiff any of the following information that they have under their control which is applicable to the pending cases: (1) whether they manufactured, supplied, used, or allowed to be used asbestos-containing products during the time and at the places designated by the plaintiffs; (2) the dates of an employee's hiring; (3) the dates of various job assignments held by the employee (this requirement refers to general job assignments, i.e., crane operator in the strip steel, and not daily or weekly moves within the work site); and (4) the time period when any non-employee plaintiff's employers or outside companies had a contract to provide services within the premises, as well as a general description of the contract or project, i.e., install lining of boiler #2. This last requirement is *not* meant to instruct the defendants to provide an indication of each day an individual may have been on the premises.

2. All defendants who do not disclose said information, or a reasonable explanation as to why they cannot provide said information, will be deemed to have ***admitted*** the accuracy of the plaintiffs disclosure and will *not* be permitted to offer evidence to rebut such disclosure.

Appendix E

C. Discovery on all issues may begin on *MARCH 12, 2002.* Said discovery shall be conducted in accordance with the First Master Case Management Order filed on May 24, 2001, so long as it does not contravene the specific requirements of this Order.

D. EVIDENTIARY DEPOSITIONS:

1. Defendants may begin to take depositions of the plaintiffs on *MARCH 27, 2002.*

2. Depositions of the defendants' experts may begin on *MAY 16, 2002.*

3. All depositions must be completed by *AUGUST 5, 2002.*

4. All parties shall designate in writing any depositions they intend to use at trial, including page(s) and line number(s) by *AUGUST 9, 2002.*

E. WITNESS DISCLOSURE:

1. Plaintiffs must disclose all product and premises identification witnesses they intend to call at trial by *APRIL 16, 2002*, along with the following information: (1) what product(s) they will be identifying; (2) on which premises the products were located; and (3) their addresses and phone numbers. If this information is not provided by the deadline, such witnesses will not be permitted to testify at trial.

2. Plaintiffs must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before *APRIL 16, 2002.* Defendants must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before *MAY 16, 2002.*

3. Plaintiffs must disclose all lay witnesses (excluding product and premises identification witnesses) not previously disclosed by *MAY 16, 2002.* The defendants must disclose all lay witnesses that they intend to call at trial by *JUNE 17, 2002.*

4. Plaintiffs must disclose any rebuttal experts by *JUNE 5, 2002.*

F. Plaintiffs must provide all tissue for mesotheliomas or other malignancies by *APRIL 26, 2002.* In the event additional material becomes available or is discovered thereafter, it shall be provided within seven days after first coming into possession of plaintiffs' counsel.

G. Within fifteen days after verdicts are rendered in Groups I-III, parties must identify all lay witnesses who are testifying in the causation and damages mini-trials, along with addresses and phone numbers of those witnesses.

H. MEDICAL EXAMINATIONS:

1. Defendants may begin scheduling Rule 35 medical examinations by *MARCH 12, 2002.*

2. If, by *APRIL 12, 2002*, plaintiffs provide defense counsel with general medical authorizations for the last ten (10) years *and* authorizations for all treatments or tests associated with a plaintiff's lungs *and* an affidavit covering a plaintiff's smoking history and/or use of tobacco products, the plaintiffs will not have to produce any medical records except those their treating physician and/or medical experts will rely upon at trial.

3. With regard to those plaintiffs who meet the medical and smoking disclosures deadline set forth above, associated defendants must complete all Rule 35 medical examinations by *AUGUST 5, 2002*. Those plaintiffs who do not meet the disclosure deadlines must complete all Rule 35 medical examinations by the end of discovery.

4. Plaintiffs will be required to submit to one (1) and only one (1) Rule 35 examination unless the court rules otherwise.

5. The defendants shall promptly pay all reasonable expenses incurred by any plaintiff in attending a medical examination, including travel expenses.

I. The last day to file interrogatories, requests for production, and requests for admission is *JULY 1, 2002*.

J. The parties must provide exhibit lists by *JULY 15, 2002*. Any objections to the exhibit lists must be filed by *AUGUST 5, 2002*. Any replies to the other's objections to exhibits must be filed by *AUGUST 26, 2002*.

Appendix E

K. The plaintiffs must produce their final witness list for use at trial by *JULY 15, 2002.* Defendants must produce their final witness list for use at trial by *JULY 22, 2002.*

L. Defendants may provide a letter to any plaintiff requesting dismissal for lack of product or premises identification by *AUGUST 9, 2002.* Plaintiffs must respond in writing to any defendant's "no evidence" letter by *AUGUST 29, 2002.* Failure to respond may result in a dismissal *with prejudice* of the defendant submitting the letter.

M. DOCUMENTS:

1. All documents to be used at trial which have already been admitted in a previous asbestos mass litigation must be designated by the appropriate identifications previously assigned to it by *MAY 10, 2002.*

2. On or before *APRIL 24, 2002*, all documents already filed in a previous mass litigation but not admitted into evidence must be designated by the appropriate designation with an indication of any previous ruling on its admissibility.

3. Any documents that have not been previously offered in any asbestos mass litigation trial must be disclosed by *AUGUST 16, 2002.* This does not refer to documents relating to individual medical treatment.

4. Any settlement or document conferences may be scheduled starting on *SEPTEMBER 5, 2002.*

Appendix E

N. DISCOVERY COMPLETION DATE:
SEPTEMBER 5, 2002

All expert discovery and trial depositions to be used in Groups I-III must be completed by the end of discovery. At this time, the defendants will collectively submit a detailed schedule to the court and to plaintiffs' counsel establishing times for specific defendant-related documents and for settlement conferences with specific defendants. So far as is practicable, document issues relating to certain defendants will be dealt with in the morning session of court and settlement conferences for the same defendants will be held in the afternoon session.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia, provide a copy of this Order to lead counsel for the parties from whom the court received pleadings in the original jurisdiction proceedings and to all counsel of record in Civil Action No. 01-C-9000.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia file this Order in both the general administrative file, Case No. 01-C-9000, as well as in the specific file for the September trial, Case No. 02-C-9004.

ENTERED this 26th day of February, 2002.

s/ Martin J. Gaughan
MARTIN J. GAUGHAN, JUDGE
13th Judicial Circuit, By Special Assignment

APPENDIX F — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *PLAINTIFF'S JOINT SUBMISSION OF COMMON ISSUES TO BE TRIED PURSUANT TO JUDGE GAUGHAN'S ORDER OF FEBRUARY 26, 2002* CIVIL ACTION NO. 02-C-9004

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION

CIVIL ACTION NO. 02-C-9004

PLAINTIFF'S JOINT SUBMISSION OF COMMON ISSUES TO BE TRIED PURSUANT TO JUDGE GAUGHAN'S ORDER OF FEBRUARY 26, 2002

* * *

COMMON ISSUES PROPOSED

* * * In summary the following common issues of liability are the common issues that Plaintiffs believe should proceed to trial:

1) whether the defendants manufactured or sold asbestos-containing products not reasonably safe for their intended purpose, and if so, when,

2) whether the defendants were negligent in the manufacture and sale of asbestos-containing products, and if so, when,

3) whether certain defendants engaged in an illegal conspiracy to fraudulently conceal or misrepresent the hazards of asbestos,

4) whether defendants engaged in conduct warranting an award of punitive damages and if so, what multiplier of compensatory damages should be determined as punitive damages,

5) whether the defendants sold products that breached an implied warranty of fitness,

6) whether certain defendants are successors in liability to predecessor asbestos product manufacturers,

7) whether the distributor sold a defective product manufactured by another company,

8) whether 3M masks were defective and unsuitable for protection from asbestos,

9) whether 3M made any representations to either distributors or companies that its masks were suitable for protection from asbestos,

10) whether it was reasonably foreseeable that 3M's masks would be used for protection from asbestos even if there is a finding that 3M did not represent that its masks would protect individuals from the hazards of asbestos,

Appendix F

11) the period of time that 3M sold and distributed their defective respiratory protection products,

12) whether a premises owner failed to maintain a reasonably safe workplace;

13) if so, what period or periods of time did the premises owner fail to maintain a reasonably safe workplace.

14) was the opportunity for exposure to respirable asbestos a specific unsafe working condition which presented a high degree of risk by a strong probability of serious injury or harm, pursuant to Section § 23-4-2(c)(2)(i), and

15) did employer violate the provisions of § 23-4-2(c)(2)(ii).

* * *

PLAINTIFFS,

By counsel

APPENDIX G — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *EXCERPTS FROM AUGUST 12, 2002 TRANSCRIPT*, CIVIL ACTION NO. 02-C-9004, AUGUST 12, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS

CIVIL ACTION NO. 02-C-9004

Monday, August 12, 2002

Hearing before:

The Honorable Arthur M. Recht, Judge
The Honorable Booker T. Stephens, Judge
The Honorable Alan D. Moats, Judge

Appendix G

[Commencing at page 20]

* * *

JUDGE STEPHENS:

The trial scheduling order calls for three separate trials for the September mass trial. Judge Recht and I have decided to modify, and we feel we have the authority to modify, that order.

For the September mass trial, we will try only the premises and the manufacturers cases.

So that you know who is who, I will be handling the manufacturers cases and Judge Recht will be dealing with the premises cases.

[24] * * *

JUDGE RECHT:

But if you have a sufficient number of potential Plaintiffs who are invitees, let's say who are employees of independent contractors who happened to be on the premises, there is a reason to try that group, obviously, under a different standard.

Then you will try the deliberate-intent cases. Then whoever falls within that in terms of the common issues. So that you might have some people in both.

* * *

Appendix G

MR. VICTORSON: Presumably, if I understand the Court's ruling, if you have a plaintiff who has claims pending against an employer and also has claims pending against one or more premises owners as a contractor employee, they actually have claims that would now be in two different trial groups; it would be tried at different times.

JUDGE RECHT: In terms of the, quote, [25] common issues, and I realize somebody suggested that's a term you don't like to use, but we are going to use it. In terms of the common issues, I think there is a reason to demarcate, actually, between the two. Then you can see where each one falls. I don't know.

But it just makes sense to try them separately.

* * *

[74] * * *

MR. FRISKE:

But in Oberg the Supreme Court says, We have done that on the assumption that traditional common law procedures, traditional common law safeguards apply.

And when they don't, when the State has removed those procedures, and they were important to the defendant to protect needless [75] or excessive punitive damages, that presumptively violates the due process.

* * *

Appendix G

The very core of that procedure is that a jury decides punitive damages, has discretion to decide, knowing the amount of the compensatory damages, knowing the actual harm [76] done by the defendant's conduct, and in that light making a determination is something needed to punish and deter, and if so how much is needed to punish and deter.

Under this multiplier procedure those decisions are never made by the finder of fact. They are not made because they can't be, because the jury deciding liability doesn't know these critical facts.

So whether you focus on the West Virginia rules specifically or you focus on the general common law model, unquestionably, the defendants under this procedure are losing traditional common law safeguards. They don't have them anymore.

Oberg says this is presumptively a due-process violation.

* * *

[78] * * *

But if you otherwise going to the use the multiplier procedure, then we get this issue of these claims, of which there are many, hundreds if not thousands of claims in this case, that have no connection to West Virginia.

They involve non-West Virginia residents and no exposure in the state by use of the product by the claimant in the State of West Virginia.

I don't think there is any question under United States Supreme Court law that West Virginia law constitutionally cannot be applied to those claims.

* * *

[79] * * *

MR. FICKLE:

But there never has been a contrary [80] argument in this case that, consistently with the Supreme Court's decision in Shutts that West Virginia law, and particularly here, West Virginia punitive damages law could apply to these claims.

* * *

[97] * * *

JUDGE RECHT: So a specific finding and conclusion will be made now that the trials that are going to proceed on the 23rd in the premises liability and manufacturing will use the punitive damage multiplier.

The objection of all the defendants will be noted and preserved.

* * *

[108] * * *

MR. VICTORSON:

Let me begin by indicating that, particularly from a premises standpoint, the common-issues approach that is suggested is an effort to have a one-size-fits-all proceeding in which the issues

that would be decided we believe ultimately will be made so generic as to at best be of little value and at worst become a denial to the parties, in particular the defendants, of due process, and with regard to the defendants an ability to defend, all in the name of expediency.

* * *

[113] * * *

Going back to what I began with as a one-size-fits-all approach, we are dealing with different types of facilities, not only at different locations, and dealing with different time periods, but we are dealing in many instances with extremely large facilities. Those facilities are not static. They are not facilities which were built at point A and were made absolutely the same all the way up until point B, some future point when a plaintiff was [114] on the premises and alleged exposure to asbestos-containing products and then remained static up to point C when we are here seeking to have a trial.

These are very different, very different situations that we have.

If you take the generic facility which may exist, it could be a mile, a mile and a half, two miles long; it could be a half a mile wide, it could have multiple units, multiple buildings, some units being inside, some units being outside, perhaps some facilities at one time being completely asbestos-free, other facilities perhaps having been built with asbestos-containing products at one time, work having been done on them, those products perhaps having been removed at other times.

* * *

Appendix G

[129] * * *

MR. JAMES:

So the current class of defendants remaining, and there are over 150 of them, if a jury is asked to determine product defect for 150 defendants at all different types of products, higher dose, low dose, suppliers, obviously, premises, et cetera, no jury could keep all of those straight and give a defendant its right to a trial consistent with due process.

No jury can keep individual issues that are important to each individual defendant in a product defect case straight consistent with due process.

* * *

[130] * * *

MR. JAMES: If you look at the large number, whatever the number may be, thousands of cases, there are hundreds of different crafts, hundreds of different types of defendants, hundreds of different types of products and constitutionally you can't lump all of those, even if you split them into two classes, premises and products, constitutionally you cannot ask a jury to answer any question that would be helpful later on.

* * *

[134] Because of our mass trial system our state has been inundated with out-of-state Plaintiffs having no connection with this state either by residence or work ever in their lives.

And I won't go too much on that soapbox because that has all been done.

But in the product defect Phase I contemplated common issues, all of those other states' laws would have to be instructed to this Phase I jury. Every state where a plaintiff comes from and comes to our state, the jury would have to be instructed on the product defect law, the warnings law, and all of the other issues that are part and particle of all of those other states' product liability law and this jury would have to be asked to determine product defect for a given defendant, in fact, all the defendants given all of other states I submit that no jury can be asked consistent with due process and other constitutional mandates to undertake that task.

* * *

[172] * * *

JUDGE RECHT:

We understand the argument made regarding choice of law.

We understand that there may be Plaintiffs that absolutely have no nexus whatsoever. I don't know.

But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of this trial.

And to the extent that anybody is aggrieved by that, your objection is noted and preserved.

MR. JAMES: And only West Virginia law.

[173] JUDGE RECHT: And only West Virginia law.

* * *

[176] * * *

JUDGE STEPHENS: For purposes of your product or the manufacturer, also on page 22 of the common issues briefed by Plaintiffs, questions one through seven, these are the only ones that were proposed; the defense didn't offer any proposed questions.

So that will be the manufacturers questions one through seven. . . .

* * *

[207] * * *

JUDGE MOATS: The employer phase of the case dealing with the deliberate intent we have separated out, and I would like to start that trial on December the 2nd.

* * * *

APPENDIX H — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *EXCERPTS FROM PHASE 1 TRIAL TRANSCRIPT*, CIVIL ACTION NO. 02-C-9004, SEPTEMBER 23, 2002 TO OCTOBER 24, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS TRIAL GROUP

CIVIL ACTION NO. 02-C-9004

Monday, September 23, 2002

Hearing before:

The Honorable Arthur Recht, Judge
The Honorable Booker T. Stephens, Judge

Appendix H

[Commencing at page 149]

* * *

JUDGE RECHT: I believe, from what we have been told, that the vast majority of premises defendants have resolved.

Is that correct?

MS. KEARSE: Yes, Your Honor.

MR. MATTOCK: At this moment there is one premises defendant left, Union Carbide.

JUDGE RECHT: That being the case, Judge Stephens and I have agreed that we are going to have one trial.

We are going to combine the Union Carbide premises case and fuse it with the manufacturers asbestos-containing products case or products case, whatever you want to call it, all to be tried in one courtroom.

[150] And as of right now, unless something drastically has changed, it will be on the seventh floor in Judge Zakaib's courtroom.

We will tell the jury in the premises case, because I don't think we will be able to reach them tonight, they will be here tomorrow, and we are just going to tell them to go home.

And we will use the products panel.

Does everybody understand that?

Anybody for Carbide, if you want to object to it, your objection is certainly noted.

If you want to talk about it, we will talk about it.

Sure. Go ahead.

MR. BICKS: Your Honor, Peter Bicks.

We would like to object to this.

Obviously, this is the first that we are hearing of this. We are now less than —

JUDGE RECHT: It is the first you heard, sir, that it is definitely official.

MR. BICKS: That's right, Your Honor. We had some discussions with the Court earlier today where there were some discussions that this was a possibility.

[151] During those discussions we pointed out to the Court the concern that we had that, of course, changing the playing field now 12 hours before juries are about to be selected in major cases was extraordinarily unfair to the parties in this case.

Appendix H

This is a very unusual development.

We are now looking at a situation where with respect to Union Carbide we are talking about different legal issues.

Premises, on the one hand, raise completely different legal questions, as opposed to products on the other hand.

We are dealing with completely different products now, dealing with a calidria asbestos, which has nothing to do with a premises cases.

We are dealing with completely different locations now, facilities out in California, now, as compared to facilities in West Virginia.

The Plaintiffs against Union Carbide in the premises case are different plaintiffs than they are against Union Carbide in the products case.

Union Carbide, I think, as is everyone [152] else, has been working hard to try to get these cases ready. And the operating assumption has always been that the premises case and the products case would be tried separately.

That's the way that the jury selection process has gone. The whole questionnaire process, all the pretrial planning for this case, and these cases, which has extraordinary magnitude.

And now 10 after 4:00 a decision has been made to collapse these cases is a violation, we believe, of due process.

Appendix H

Union Carbide would ask that the premises case be severed and the premises case could trail after the products case, or perhaps go on simultaneously.

But there could be no reason to have those two issues resolved in the same proceeding before the same jury.

This will give rise to incredible confusion to the jury with respect to Union Carbide and the examinations of all the witnesses, which really there is, from Union Carbide's perspective, no overlap among the [153] witnesses.

So Union Carbide will be putting on a defense of calidria in a case where there are premises issues and the premises case will be putting on a defense that has nothing to do with the Calidria case.

So it is creating a structure which is unfair and prejudicial to Union Carbide.

And particularly coming at this last second, we would make a motion to have the premisis case severed and the premises case can trial or be tried as the same time.

But we are prepared to try these cases.

We were prepared to try these cases along the rules that had been set by the Court and that the parties have been working hard to meet.

So we would object to that.

Appendix H

MR. PARNELL: Your Honor, I know that we are on the same side and we are a virtual law firm.

Could I just have two comments?

In the whole history of mass litigation, there has never been, that I am aware of, a [154] premises case tried with a products case. Every argument that's ever been made has been for severance.

The reality is that prior to the time that both of Your Honors were involved, the whole reason for two separate trials, as I understood it, was because it was perceived by both the Courts and the parties that the premises cases were so distinctly different from the products cases they should have a separate courtroom, separate jury structure.

Now, for whatever reason — I'm not suggesting that you don't have judicial reasons for doing it, but I am saying it is contra to everything we planned. And this whole six months and all the planning and structure that we as a defendant have put into this is now put asunder, if you will, and we are divorced from the original strategy that everybody thought out.

So my suggestion is, I would only add that the Court should grant at least, if not a grant of severance, it should grant at least a week's continuance so that we can regroup.

Appendix H

[156] * * *

JUDGE RECHT: We are not insensitive to the position of Union Carbide insofar as the premises liability phase of this case is concerned.

There is absolutely no doubt that that is the way we intended to try these cases, until we realized this morning that we only were going to be trying one premises defendant.

We also realized that there was going to be some commonality of witnesses even if we had separate trials proceeding with separate panels. That was always contemplated.

Parnell is concerned about the reasons why. It is purely for judicial economy. We think it is an effective, economical way to try all these cases with one jury.

We can assure you that we will be able to present to this jury Carbide's position vis-a-vis premises and products in a clear and distinct fashion.

I cannot imagine how Carbide would not be ready to proceed on to trial, simply because we are going to now have one jury, that it will [157] be able to now combine the forces.

But I'm not going to patronize anybody at all. I'm not suggesting that.

I don't think it is unfair. I don't think there is any delay that would be required.

I think it is an efficient to way to proceed on.

But your objection is noted and preserved.

* * * *

Appendix H

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS TRIAL GROUP

CIVIL ACTION NO. 02-C-9004

VOLUME XIII

Tuesday, OCTOBER 15, 2002

HEARING BEFORE:

THE HONORABLE BOOKER T. STEPHENS, JUDGE

Appendix H

[Commencing at page 4082]

* * *

BY MS. THORPE: -

Q. Dr. Gibbs, have you formed an opinion to a reasonable degree of medical certainty regarding whether or not Calidria chrysotile asbestos causes disease in humans?

A. Yes, I have formed an opinion.

Q. And if you could keep your voice up. What is that opinion?

A. My opinion is that it does not cause disease in humans.

Q. And Dr. Gibbs, have you also formed an opinion to a reasonable degree of medical certainty regarding whether or not a tremolite-free pure chrysotile asbestos which contains short fibers causes disease in humans?

A. Yes. I have formulated an opinion, and that is that it does not.

Appendix H

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS TRIAL GROUP

CIVIL ACTION NO. 02-C-9004

VOLUME XV
Pages 4745-5068

THURSDAY, OCTOBER 17, 2002

HEARING BEFORE:

THE HONORABLE BOOKER T. STEPHENS, JUDGE

Appendix H

[Commencing at page 4816]

* * *

MR. TAYLOR:

Do you have an opinion to a reasonable degree of medical and scientific certainty whether or not Calidria chrysotile asbestos causes mesothelioma?

A. Yes, I do.

Q. What is your opinion?

A. I believe it does not.

Q. That you would also testify "about the diagnosis of lung cancer?"

Stop again.

Do you have an opinion to a reasonable degree of medical and scientific certainty whether or not Calidria chrysotile asbestos causes lung cancer?

A. I think it would be highly unlikely, and that it does not.

Q. And last, "other asbestos-related diseases."

What is your opinion about Calidria chrysotile asbestos to cause these other asbestos-related diseases?

[4817] A. The same.

* * * *

APPENDIX I — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *JUDGE'S CHARGE TO JURY*, THE HONORABLE BOOKER T. STEPHENS, CIVIL ACTION NO. 02-C-9004, OCTOBER 24, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: Asbestos Personal Injury Litigation;

CIVIL ACTION NO. 02-C-9004;

JUDGE'S CHARGE TO THE JURY;

Members of the Jury: You have heard the opening statements of the lawyers, you have heard the testimony of the witnesses and soon you will hear the closing arguments of the lawyers. At this point in the trial I, as the trial judge, am required to inform you, the jury, as to the law applicable to this case which shall guide you in your deliberations. This statement of law is known as the Judge's charge to the jury; it is also called jury instructions.

The Court instructs the jury that there is one defendant involved in this case. The plaintiffs must prove their case against the defendant in order to recover from the defendant. You must weigh carefully the testimony regarding the condition of Union Carbide's premises and the products which it manufactured as well as the conduct of the defendant in accordance with the instructions which I am about to give to you.

Appendix I

Members of the Jury, it is your exclusive duty to determine the facts of this case, quite often you are referred to as the judges of the facts. It is my duty to state to you the law of this case. Your oath as a juror requires you to apply the law as given to you by this Court to the facts determined by you from the evidence. You are not permitted to change the law or apply your own ideas of what you think the law should be. Both this Court and you, the Jury, are bound by the law as stated and expressed in this charge.

Nothing said or done by the lawyers who have tried this case is to be considered by you as evidence of any fact. Opening statements of the lawyers are intended to give you an outline of what each side expects to prove so that you may better understand the testimony of the witnesses. The closing arguments which you will hear in a few minutes are often very helpful in refreshing your recollection as to the testimony of the witnesses and such facts as may be developed by the testimony, but it is my duty to caution you that your verdict shall not be based upon statements made to you by the lawyers at the opening of the trial or upon their closing arguments. Your verdict, in other words, shall be based upon the evidence as you hear it from the witness stand and as you recollect it, not as the lawyers or this Court may recollect it.

Likewise, nothing that I have said or done at any time during this trial shall be considered by you as evidence of any fact or as indicating any opinion concerning any fact, the credibility of the witnesses, or the weight of the evidence.

The Court instructs the jury that it should disregard entirely questions to which an objection was sustained or answers or

exhibits ordered stricken out of the evidence. It is not the province of the jury to determine the admissibility or validity of the testimony.

Do not draw any conclusions or speculations as to why or why not certain testimony or other evidence was excluded or admitted.

While you should consider only evidence in this case, you are permitted to draw such reasonable inferences from the testimony as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established from the testimony and the evidence in this case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all the evidence as true or accurate. You are the sole judges of the "credibility" or "believability" of each witness and the weight to be given to his testimony.

As used in this charge, "credibility-of a witness" means the truthfulness or the lack of truthfulness of a witness. The "weight of the evidence" means the extent to which you are or are not convinced by the evidence. The number of witnesses testifying on one side or the other of any issue is not alone the test of the credibility of the witnesses and the weight of the evidence. If warranted by the evidence, you may believe one witness against a number of witnesses testifying differently. The tests are: How truthful is the witness, and how convincing is his evidence in the light of all the evidence and circumstances shown?

Appendix I

In determining the credit and weight you will give to the testimony when a witness has testified before you, you may consider, if found by you from the evidence: his good memory or lack of memory; his interest, or lack of interest, in the outcome of the trial; his demeanor and manner of testifying; his opportunity and means, or lack of opportunity and means, of having knowledge of the matters concerning which he testified; the reasonableness or unreasonableness of his testimony; and his fairness or lack of fairness.

From these and all other conditions and circumstances appearing from the evidence, you may give to the testimony of the witnesses such credit and weight as you believe it is entitled to receive.

The Court further instructs the jury that the rules of evidence ordinarily do not permit an opinion to be received as evidence. A witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or conclusion. You should weigh the reasons, if any, given for it. You may also consider the process of his reasoning. His possible bias in favor of the side for which he testified, his relative opportunities for study and observation in that which he testified, and any other matters which serve to illuminate his opinions and conclusions. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Appendix I

A witness may be discredited or "impeached" by contradictory evidence, by showing that he testified falsely concerning a material matter or by evidence that at some other time a witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an accident or transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

If you believe that any person testifying in this case has knowingly testified falsely as to any material fact, you may believe such parts of their testimony as you believe to be true and reject such parts as you believe to be false, or you may refuse to believe any part of such testimony, for it is a matter for you to determine, from all the testimony taken and all the circumstances surrounding this case, which witnesses have testified truthfully and which ones, if any, have testified falsely.

During the trial of this case, certain testimony has been presented to you by way of depositions read from the witness stand and depositions previously recorded (herein "Depositions") which consisted of sworn recorded answers

to questions asked of the witness in advance of this trial. The testimony of a witness who, for some reason, cannot be present to testify in person from the witness stand may be presented under oath by way of "Depositions". Such testimony is entitled to the same consideration, and is to be judged as to credibility, weighed, and otherwise considered by the jury, in the same way as if the witness had been present, and had testified from the witness stand.

As I indicated to you during the voir dire this is a civil case, in a civil case the burden of proof is upon the party instituting the suit to prove every essential element of the relief claimed by a preponderance of the evidence, except when the Court instructs you to follow a different standard, referred to as the clear and convincing evidence standard, which I will discuss later in the charge. Here, I will tell you about the preponderance of the evidence standard. If the proof should fail to establish any essential element of the relief claimed by the instituting party by a preponderance of the evidence in this case, then the jury should find for the party against whom relief is sought.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not. In other words, a preponderance of the evidence in a case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proven is more likely true than not true. This rule does not, of course, require proof to an absolute certainty since proof to an absolute certainty is seldom possible in any case.

Appendix I

In determining whether any fact in issue has been proven by a preponderance of the evidence in this case, you, the jury, may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. By preponderance of the evidence is meant the greater of the weight of the evidence. It does not necessarily mean that a greater number of witnesses have testified on one side of the case than on the other; the preponderance lies on the side whose testimony, taken all together, is more satisfactory and convincing to you. As I have indicated this burden of proof standard must be met by the parties instituting this civil action referred to herein as "the plaintiffs".

If the evidence of the plaintiffs, the parties having the burden of proof, does not outweigh that of the defendant, namely: Union Carbide Corporation (premises liability); Union Carbide Corporation (product liability); the party against whom relief is sought, or if the evidence is evenly balanced, then the plaintiffs have failed to meet their burden of proof requirement.

On the other hand, if the evidence of the plaintiffs outweigh the defendant, even in the slightest degree, then plaintiffs have met their burden of proof. In other words, the plaintiffs merely need to prove their claim is more likely so than not.

Appendix 1

CLAIM AGAINST UNION CARBIDE CORPORATION (PREMISE LIABILITY)

The plaintiffs contend that the defendant Union Carbide failed to provide a reasonably safe place to work due to the presence of respirable asbestos fibers on the work site. The plaintiffs contend that these asbestos containing products released fibers upon being cut, sawed or otherwise disturbed. The plaintiffs further contend that these released asbestos fibers were a hidden or latent dangerous condition, which was reasonably foreseeable to the defendant Union Carbide.

Under the law of the State of West Virginia, the owner of a place of employment, i.e., the premises owner, owes to a non-employee workman or any independent contractor the duty to maintain the premises in a reasonably safe condition. The employer also has the further duty to exercise reasonable care for the safety of such non-employee or independent contractor. In order to recover in this case, the non-employee workman or independent contractors, that is the plaintiffs, must establish by a preponderance of the evidence that Carbide knew or should have known at the time in question that the presence of asbestos fibers at its facilities presented a risk of harm to workers on those premises, and that Union Carbide failed to exercise ordinary care for the safety of non-employee workers by providing warnings, safety information, protective equipment, monitoring at that time that such asbestos fibers were present and that this failure proximately caused or contributed to the injuries to such non-employee workers.

Appendix I

Whether Carbide knew or should have known-that the use of asbestos-containing products at its facilities presented a risk of harm to non-employee workers on their premises is judged from the perspective of a reasonable person or corporation during the time and under the circumstances of the workmen's presence in the workplace hazard.

You are instructed that the plaintiffs allege that the defendant Union Carbide failed to provide a reasonably safe place to work. Under the law of West Virginia, you must find that the plaintiffs proved each of the following elements: the foreseeability that an injury might occur; the severity of the injury; the normal or expected use made of the premises: and the magnitude of the burden placed upon the defendant to guard against injury.

In considering these factors, you should consider the definition of foreseeability. In determining forseeability, you must consider whether the ordinary man in the defendant Union Carbide's position, knowing what it knew or should have known, anticipated that harm of the general nature of that suffered was likely to result. In determining the severity of the injury, you should consider the nature of the injury, its permanency, its capacity to lead to future complications, the ability of the person suffering the injury to avoid or prevent the injury and the ability of the human body to recover from the injury. You are instructed that the plaintiffs contend that their injuries here which were the result of inhaling asbestos fibers, are; the presence of asbestos fibers in the lung, pleural disease, asbestosis, cancers and mesothelioma. You are instructed that you may find for the Plaintiffs, if you find that they have proved by a preponderance of the evidence

that these injuries are severe. As to the last element regarding the magnitude of the burden placed upon the defendant, here Union Carbide, the Court instructs you that this refers to the ability of the defendant Union Carbide to take safety measures, which would guard against the injuries suffered by the plaintiffs.

You are further instructed that the law requires that the plaintiffs prove the time, manner and circumstances under which the injured party entered the premises. The plaintiffs here contend that employees of contractors at all relevant times entered the premises on a regular or routine basis to perform various maintenance and construction activities which resulted in their exposure to asbestos fibers.

If you find that the plaintiffs have met their burden of proof as to each of these factors, then you may find in favor of the plaintiffs and against the defendant Union Carbide. If you find by a preponderance of the evidence that non-employee workmen or independent contractor employees were placed in a position in which they were injured as a result of fault on the part of Carbide as defined above, then you may find against Carbide and in favor of the plaintiffs.

You are instructed that a latent danger is the same thing as a hidden danger. A danger is latent if it is a dangerous condition that the person on the premises-as a contract worker, does not actually know about and would not be expected to observe in the exercise of ordinary care. A hidden danger may be totally or partially obscured from sight but it need not be if the circumstances are such that the guest would not be expected to observe the dangerous condition in the exercise

of ordinary care. In considering the ordinary care of the plaintiffs, you are instructed for purposes of this common issues case that these plaintiffs, in the exercise of ordinary care, could not be expected to observe breathable asbestos dust as a hazard.

A person who is present on a premises as a contract worker, is a person who is there at the invitation, request, or consent of the owner.

The plaintiff's claims against Union Carbide's facilities are based on a legal concept which is referred to as premise liability. Under the law of the State of West Virginia, the owner of a place of employment, i.e., the premises owner, owes to a non-employee workman or any independent contractor the duty to maintain the premises in a reasonably safe condition and has the further duty to exercise reasonable care for the safety of such persons.

The plaintiffs in this case claim that they worked at Union Carbide sites, but not as employees of Union Carbide.

In order to recover in this case, the plaintiffs must establish by a preponderance of the evidence that Union Carbide knew or should have known at the time in question that the use of asbestos-containing products at each location on each of its facilities presented an unreasonable risk to workers on each of those premises, such as the plaintiffs, and that Union Carbide failed to exercise ordinary care for the safety of a non-employee worker, such as the plaintiffs, by providing warnings, safety information, protective equipment and other preventive measures, and that this failure proximately caused or contributed to the injuries complained of by plaintiffs.

Appendix I

Whether Union Carbide knew or should have known that the use of asbestos-containing products at its facilities presented an unreasonable risk to workers on the premises is judged from the perspective of a reasonable person or corporation during the time and under the circumstance of each alleged exposure to the workplace hazard.

The Court further instructs the jury that the premises owner is not liable for harm caused to a third party by an independent contractor or the contractor's employees if the premise owner did not control, or have the right to control, the contractor's operations.

An owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract-including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work-without changing the relationship from that of owner and independent contractor, or changing the duties arising from that relationship. If the right to control or supervise the work in question is retained by the person for whom the work is being done, the person doing the work is an employee and not an independent contractor, and the determining factor in connection with this matter is not the use of such right of control or supervision but the existence thereof in the person for whom the work is being done.

Thus, to find in favor of the plaintiffs, you must find that the plaintiffs have satisfied their burden of proving, by a

preponderance of the evidence, that Union Carbide either controlled, or had the right to control, the work or operations at the work site that caused injury. In determining whether a workman is an employee or an independent contractor, the controlling factor is whether the hiring party retains the right to control and supervise the work to be done.

CLAIMS AGAINST UNION CARBIDE CORPORATION (PRODUCT LIABILITY)

In West Virginia, a product is defective if it is not reasonably safe when the product is used in the way it was intended to be used by persons who the given defendant could reasonably foresee might use or be exposed to its product.

You are instructed that a product is not defective merely because it is composed of or contains asbestos. If you find a product of a defendant was not defective, then there was no duty to warn. If, however, the product becomes unsafe when it is used in the way it was reasonably intended to be used the product is defective. The standard of reasonable safeness is what you find a reasonably prudent manufacturer's standards should have been during the years the product was made or sold, keeping in mind the general state-of-the-art of the manufacturing process, including design, labels and warnings at the time the product was made.

The law recognizes that some products cannot be made completely safe use and some cannot be made safe at all. Such products, nevertheless, may be useful and desirable.

Appendix I

However, if a company knows or has reason to know that a characteristic of its product may harm those who use it in the way it was intended to be used it must provide adequate labels, instructions or warnings concerning the potential harm that may result from the intended use of the product. The failure to provide such adequate labels, instructions or warnings makes the product defective. The duty to warn users of the risks inherent in a company's product is imposed upon those who manufacture and sell products based upon the law that users are entitled to the information necessary to make intelligent decisions as to whether a product's benefits justify their exposing themselves to the risk of harm which may result from-using the product and to take precautions to avoid a product's hazards. A duty to warn arises when a company knows or has reason to know that a danger exists with respect to the reasonable intended use of a product. In this regard those who manufacture products are held to the knowledge of experts in the field of manufacturing of the same or similar products at the time the products were made.

That is to say, they are required to keep abreast of scientific developments concerning their products and if they have knowledge or reason to believe that their products may cause harm to persons who use them then they must test and inspect the products accordingly. The extent of research and experimentation required is determined by the extent of danger involved in the use of a product.

Reasonable safeness is determined by what a reasonably prudent manufacturer's standards have been at the time the product was manufactured, considering the general state-of-the-art regarding such products at the time of the manufacture.

Appendix I

Now, intended use includes those uses which are reasonably foreseeable considering the product's characteristics and instructions for use, intended use does not include an abnormal use of the product or an unusual or unforeseeable use of the product. Foreseeability as applied to a manufacturer's products liability is a narrow issue. A manufacturer must anticipate all foreseeable uses of his product. In order to escape being unsafe, a potentially dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe. The question of what is unintended use of a product carries with it the concept of all those uses a reasonably prudent person might make of the product having in mind its characteristics, warnings and labels.

The phrase "state-of-the-art" as used in these instructions means and includes all of the reasonable available knowledge on a subject at a given time, and this included scientific, medical, engineering and any other knowledge that may be then available. The state-of-the-art is not an unchanging level of knowledge but is continually changing.

In deciding whether a manufacturer has a duty to warn, you should consider the state-of-the-art at the time of the manufacture and sale of the product. The standard of reasonable safeness is determined by what a reasonably prudent manufacturer or seller knew or, given the state-of-the-art, should have known at a given point in time.

The Court instructs the jury that a manufacturer of a defective product cannot rely on other manufacturers, distributors or other parties to advise the users of their products concerning a danger in the use of products concerning asbestos.

Appendix I

The manufacturer has a nondelegable duty to test its products and to warn users of any foreseeable dangers resulting from the use of the product or products. The warning provided by a manufacturer of a defective product containing asbestos must be reasonably calculated to reach the ultimate consumer or the person reasonably expected to come into contact with the product.

The presence of an intermediate party between the manufacturer and consumer does not relieve the manufacturer of this duty or permit the manufacturer to escape responsibility for any injury or harm proximately caused or contributed to by its product. In West Virginia the manufacturer is not under an obligation to produce a completely safe product, nor is the manufacturer an insurer of the product.

If any warning is issued by a manufacturer relating to a dangerous condition arising from the use of the product the jury must determine whether the warning is adequate. Whether or not the manufacturer's warning is adequate depends on the nature and degree of the hazards of which the manufacturer knew or reasonably should have known, the information which the manufacturer might reasonably anticipate that the user will need and whether the physical appearance and location of the warning is reasonably calculated to be observed and understood by the user.

You have heard testimony about government regulations regarding asbestos and asbestos-containing material passed or enacted after the asbestos-containing materials at issue were manufactured or sold. The Court instructs you that

subsequent government regulations, such as those of the EPA or OSHA, are not a basis for imposing liability on a defendant who has not manufactured an allegedly defective product after the regulations became effective.

You should not consider subsequent Government regulations in deciding whether the plaintiffs have met their burden of proving a defendant's liability under any of plaintiffs' theories.

CONSPIRACY CLAIM

The plaintiffs here contend that the defendant, Union Carbide acted with others in a conspiracy to conceal or minimize the risks of exposure to the hazards of asbestos.

You are instructed that if two or more persons do a tortious act or acts in concert, or pursuant to a common design, then each is liable for the harm caused thereby. Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. The mere common plan, design or even express agreement is not enough for liability as there must be acts of a tortious character in carrying it to execution.

A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The essential elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished;

(3) a meeting of minds as to the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.

A conspiracy by itself is not an offense under West Virginia law. In order for a civil conspiracy to be unlawful, Plaintiffs must prove that the Defendant has committed some wrongful act or has committed a lawful act in an unlawful manner to the injury of the Plaintiffs. While they need not produce direct evidence of a meeting of the minds, Plaintiffs must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective. You must determine whether Union Carbide participated in any alleged conspiracy and consider the evidence as to each member of the conspiracy separately.

Plaintiffs maintain that defendant Union Carbide, through its membership in the IHF and other organizations and customers of its Calidria asbestos products, acted jointly with other entities to wrongfully and fraudulently withhold information from the public and to misrepresent the hazards of exposures to asbestos dust by influencing the medical literature and disseminating this literature to the public and to legislative bodies responsible for regulatory control of asbestos with the specific intent of misrepresenting the existing scientific information and suppressing contrary scientific data.

In this case, Plaintiffs allege a conspiracy to commit fraud. To prevail on their fraud claim under West Virginia law, Plaintiffs must establish the following elements: (1) that the act claimed to be fraudulent was the act of the Defendant;

(2) that the claimed fraudulent act was material and false; (3) that Plaintiffs relied upon and were justified under the circumstances in relying upon the claimed fraudulent act; and (4) that Plaintiffs were damaged because they relied upon it. Plaintiffs must establish that they reasonably relied upon the alleged fraud of the Defendant.

Plaintiffs cannot impute the actions or knowledge of a trade association to a Defendant simply because that Defendant belonged to a group and some members of that group may have committed unlawful actions. Mere membership in an unincorporated voluntary association or contribution of dues or money to promote the common purpose does not make all the members liable for any unlawful acts of the association done without the participation and without the knowledge or approval of the Defendant.

Such facts by themselves do not substantiate a conspiracy claim. Rather, for liability to be imposed, it is necessary to establish that the group itself possessed unlawful goals and that the individual Defendant held a specific intent to further those illegal aims. If you find that Plaintiffs have put forth no evidence specific to Union Carbide that Union Carbide intended to further the illegal actions of any group or association of which it was a member, you must not impute evidence of such actions to Union Carbide.

An allegation that the Defendant fraudulently concealed or misrepresented the hazards of asbestos is the basis for the Plaintiffs' conspiracy claim. The Plaintiffs must prove such a fraud claim by clear and convincing evidence. Clear and convincing evidence is a more stringent standard than a mere

preponderance of the evidence. It is the highest possible standard of civil proof. It is defined as that measure or degree of proof that will produce in your mind a firm belief or conviction as to the allegations sought to be established.

If you find that the plaintiffs have proven by clear and convincing evidence that Union Carbide and other entities together unlawfully and fraudulently concealed material information from the public regarding the hazards of exposure to asbestos dust as stated above with the intent of misrepresenting these hazards, you may make such a finding on the jury verdict form as provided.

PUNITIVE DAMAGE SECTION

If you determine that Union Carbide is liable for the failure to maintain a safe premises for workers exposed to asbestos or that the product that it manufactured and sold was defective, following this proceeding, plaintiffs in this action will be entitled to separate individual trials before another jury in the future to determine the following issues:

One, whether the plaintiff has an asbestos-related disease.

Two, whether and to what extent the defendants or defendant caused or contributed to such injury.

And, three, if liability is established, what amount will fairly compensate the plaintiff for the injury in question.

If you decide that punitive damages, as next defined for you, are appropriate to be imposed against Union Carbide then Union Carbide will have to pay plaintiffs in addition to

compensatory damages an additional amount of punitive damages.

The Court instructs the jury that where a preponderance of the evidence in a civil action shows that a defendant acted with malice, engaged in wanton, willful or reckless conduct or acted with criminal indifference of civil obligations affecting the right of others, you the jury, may assess punitive or exemplary damages in addition to compensatory damages. Plaintiffs seek punitive damages against the defendant Union Carbide.

Punitive damages are not available as a matter of right. Mere negligence or simple misconduct will not support an award of punitive damages. The decision to award punitive damages is within your sound discretion.

Punitive damages, if awarded, are in addition to compensatory damages. Such damages serve several purposes.

Some of which are, one, to punish the defendant: two, to deter the defendant and others from pursuing a similar course: three, to encourage other plaintiffs to bring an-action where such other plaintiffs might be discouraged by the cost of the action or by the inconvenience: and four, to provide additional compensation for the egregious conduct to which the plaintiff may have been subjected.

The factors that may be considered by you in awarding punitive damages are as follows: One, punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred. If the defendant's action caused or would likely cause

in a similar situation only slight harm the damages should be relatively small. If the harm is egregious the damages should be greater.

The jury may consider he reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in its actions. Whether it was aware its actions were causing or likely to cause harm. Whether it attempted to conceal or cover up its actions or the harm caused by them and whether or how often the defendant engaged in similar conduct in the past.

Three, as a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

And, four, lastly, the financial position of the defendant is relevant.

As the jury has already been instructed, a second jury will determine the amount, if any, to be awarded in compensatory damages against the defendant. Any factor this jury may establish will then be applied to the compensatory damages against the defendant. Any factor this jury may establish will then be applied to the compensatory damages awarded and a dollar figure for punitive damages will be determined.

Now, if you decide that punitive damages should be imposed against Union Carbide, then Union Carbide may have to pay plaintiffs in addition to its share of compensatory damages an additional amount for punitive damages.

Appendix I

Since you have not heard evidence concerning any of the individual plaintiffs or the injuries or compensation that any individual plaintiff may be entitled to receive, you will not be asked to make a specific dollar award of punitive damages against the defendant if you determine that the defendant should be required to pay punitive damages.

Instead, you will be asked to set a number or factor which will be used in later trials to calculate the actual dollar amount, if any, which each plaintiff is entitled to receive.

If an award of compensatory damages has been made following an individual trial, the Court will multiply the compensatory damages award by the factor number to obtain the amount to be paid as punitive damages.

When actual harm was minimal but potential harm was tremendous, the jury may reasonably find punitive damages commensurate with potential harm.

This case should be considered and decided by you as an action between persons of equal standing in the community. A corporation is entitled to the same fair trial at your hands as any private individual. All persons including corporations stand equal before the law and are to be dealt with as equals in this court of justice.

The court instructs the jury that your part in the administration of justice is exceedingly important. The parties in this case have come into this court for a trial on issues which have developed and exist between them. It is our duty, mine as judge and yours as jurors, to see that all parties get a full and

fair trial. You have been chosen and sworn as jurors to try the issues of fact presented in this case. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by conjecture, surmise, speculation, prejudice, or public opinion in these cases. The parties to this action rightfully expect that you will carefully and impartially consider all the evidence in the case and that you will carefully follow the law as stated to you by the Court.

Remember, at all times you are not partisans. You are judges — judges of fact. Your sole interest is to seek the truth from the evidence of the case.

Members of the jury, this case will now be submitted to you with a verdict form which is a series of questions. Your duty will be discharged by responding to the ones you deem appropriate based on the evidence and the court's instructions. You will complete your work when you return the verdict to the Court. It thereupon becomes the duty of the Court to direct judgment according to the law and according to the facts as you have found them.

You are to answer the questions solely upon the evidence received at this trial. You are to be guided by the Court's instructions and your own sound judgment in considering the evidence in this case and in answering these questions.

After the closing arguments this case is ready to be submitted to you for your serious deliberation. You will consider the case fairly, honestly, impartially, and in light of reason and common sense, given each question in the verdict your careful and conscientious consideration. Let your verdict speak the truth, whatever that truth may be.

Appendix I

Upon retiring to your jury room you should first select one of your number to act as a Foreperson who-will preside over your deliberations and will be your spokesperson here in Court.

You will take the verdict form to your jury room and when you have reached unanimous agreement as to the verdict, you will have your Foreperson fill it in, date and sign it, and return it to the courtroom.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

If, during the deliberations, you should desire to communicate with the Court, please reduce your message to writing signed by the Foreperson, and pass the note to the bailiff who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify how the jury stands numerically or otherwise. Members of the jury, you will now hear argument of the attorneys.

GIVEN: As Amended with objections preserved for both sides.

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JUDGE s/ Booker T. Stephens

APPENDIX J — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *JURY INTERROGATORIES*, CIVIL ACTION NO. 02-C-9004, OCTOBER 24, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION

Civil Action No. 02-C-9004

SPECIAL INTERROGATORY NO. 1

Do you find by a preponderance of the evidence that the Union Carbide premises were unreasonably dangerous due to the presence of breathable asbestos fibers in the workplace?

__X__ YES _____ NO

If your answer to this Interrogatory was "Yes", please state the dates that such premises were unreasonably dangerous.

__1945-1980__ DATES

Foreperson: s/ Robert E. Douglas

Date: 10/24/02

Appendix J

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION

Civil Action No. 02-C-9004

SPECIAL INTERROGATORY NO. 2

Taking into consideration the instructions given to you regarding what is necessary, under West Virginia law, to prove that a product is defective at the time of its sale, indicate whether Plaintiffs have proven by a preponderance of the evidence that Calidria being sold by Union Carbide Corporation was defective at any time. Answer by placing a yes or no in the space provided; if your answer is yes, place the time period during which you find Calidria was defective.

	YES	NO	DATE
CALIDRIA	X		1964-72

Foreperson: s/ Robert E. Douglas

Date: 10/24/02

Appendix J

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION

Civil Action No. 02-C-9004

SPECIAL INTERROGATORY NO. 3

Do you find by clear and convincing evidence:

(1) That the Defendant, Union Carbide, entered into an agreement to act with others to make material representations and omissions with the specific intent to defraud or mislead regarding the hazards of exposure to asbestos fibers?

Yes _____

No X

(2) That others not acting with Union Carbide in the conspiracy reasonably relied upon such misrepresentations and omissions?

Yes _____

No X

Foreperson: s/ Robert E. Douglas

Date: 10/24/02

Appendix J

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION

Civil Action No. 02-C-9004

SPECIAL INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that, when non-employee workers were present on the sites, owned by Union Carbide; Union Carbide acted intentionally, oppressively, wilfully, maliciously or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages?

__X__ YES _____ NO

Punitive damages must bear a reasonable relationship to the amount of compensatory damages awarded to a plaintiff. If you have found that Union. Carbide should be required to pay punitive damages relating to its premises conduct, by what number should compensatory damages be multiplied?

__3__ X Compensatory Damages

Foreperson: s/ Robert E. Douglas

Date: 10/24/02

Appendix J

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION

Civil Action No. 02-C-9004

SPECIAL INTERROGATORY NO. 5

Do you find from a preponderance of the evidence that at any time during the sale of Calidria, that defendant Union Carbide acted intentionally, oppressively, wilfully, maliciously or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages?

_____ YES ___X___ NO

Punitive damages must bear a reasonable relationship to the amount of compensatory damages awarded to a plaintiff. If you have found that Union Carbide should be required to pay punitive damages with regard to its sale of Calidria, by what number should compensatory damages be multiplied?

_____ X Compensatory Damages

Foreperson: s/ Robert E. Douglas

Date: 10/24/02

APPENDIX K — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *EXCERPT FROM UNION CARBIDE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR NEW PHASE I TRIAL*, CIVIL ACTION NO. 02-C-9004, AND *EXCERPTS FROM FEBRUARY 21, 2003 TRANSCRIPT*, CIVIL ACTION NO. 02-C-9004

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION ASBESTOS MASTER FILE

CIVIL ACTION NO: 02-C-9004

UNION CARBIDE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR NEW PHASE I TRIAL

INTRODUCTION

As this Court is aware, Union Carbide respectfully opposes the Trial Scheduling Order dated February 26, 2002 ("TSO") that created this Mass Trial for the resolution of approximately 8000 asbestos personal injury claims for the following reasons:

- a finding of "fault" through an aggregation of cases lacking commonality and preventing Defendants from exercising their right to be heard violated basic guarantees of due process under the United States

and West Virginia Constitutions. This violation was exacerbated by the combination of the products liability and premises liability trials on the eve of trial.

- . . .

- the existence of numerous claims resulting from events in other states that under West Virginia choice of law principles require the application of the other States' law to determinations of "fault," coupled with the trial court's application of only West Virginia law, violated the due process and federalism limitations on choice of law as set out in the United States Supreme Court ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

- the use of a punitive damages multiplier violated basic guarantees of due process under the United States and West Virginia Constitutions. In addition, the determination of punitive damages based on conduct outside West Virginia violated the federalism limitations in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).[1]

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1. Union Carbide has previously briefed these violations of the United States and West Virginia Constitutions. Union Carbide repeats and incorporates those earlier objections and accompanying briefs. Union Carbide will not devote further discussion to the constitutional issues in this brief.

Appendix K

Dated: December 4, 2002

Respectfully submitted,

By: s/ Elliot G. Hicks
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Appendix K

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

IN RE: ASBESTOS

CIVIL ACTION NO. 02-C-9004

Friday, February 21, 2003

Hearing before:

The Honorable Arthur M. Recht, Judge
The Honorable Booker T. Stephens, Judge

Appendix K

[Commencing at page 4]

* * *

JUDGE STEPHENS:

* * *

We are not going to take a lot of time. I know that you know that we have already read your moving papers. We are going to give you a chance to address them if you have something additional you wish to address.

We will start with defendant Union Carbide's motion for a new Phase 1 trial.

* * *

MR. BICKS: Good morning, Your Honors. Peter Bicks for Orrick Herrington. Nice to be back and see everyone.

In keeping with the admonitioin of Judge Stephens, I do intend to be brief, and I want to address three topics.

Obviously, the Court has received substantial briefing on issues ranging from constitutional issues to jury instructions to [5] substantive legal issues. I don't intend to repeat all of those. Obviously, we have preserved what is in our prior papers.

* * *

Appendix K

MR. PARNELL:

* * *

[32] We want to renew all of the constitutional objections that we made at the trial, Your Honor, without discussing those specifically here, because you have already indicated you have read the papers.

* * * *

APPENDIX L — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *ORDER FOR POST-TRIAL MOTIONS, HONORABLE BOOKER T. STEPHENS*, CIVIL ACTION NO. 02-C-9004, MARCH 11, 2003

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION MASS LITIGATION PANEL

Civil Action No.: 02-C-9004
2002 Mass Trial

ORDER

This matter is before the Court on the post-trial motions of Plaintiffs and Defendant Union Carbide Corporation. The parties filed several post-trial motions and corresponding memoranda that this Court carefully considered. On February 21, 2003, this Court held a hearing on Defendant Union Carbide Corporation's Motion for New Phase I Trial, Defendant Union Carbide's Renewal of Its Motion for Judgment as a Matter of Law, and Plaintiffs' Motion for New Trial.

After considering the arguments set forth by Defendant Union Carbide Corporation in support of its Motion for New Phase I Trial, this Court finds that Defendant Union Carbide Corporation has failed to demonstrate that a new trial is warranted. Therefore, Defendant Union Carbide Corporation's Motion for New Trial is DENIED.

Appendix L

This Court also considered arguments regarding Defendant Union Carbide Corporation's Renewal of Its Motion for Judgment as a Matter of Law. The Court finds that judgment as a matter of law is not proper in this case. Therefore, Defendant Union Carbide Corporation's Renewal of Its Motion for Judgment as a Matter of Law is DENIED.

Finally, the Court reviewed the arguments regarding Plaintiffs' Motion for New Trial. The Court finds that the grounds set forth by Plaintiffs do not warrant a new trial. Therefore, Plaintiffs' Motion for New Trial is DENIED.

IT IS SO ORDERED.

s/ Booker T. Stephens
The Honorable Booker T. Stephens
Circuit Court Judge

APPENDIX M — IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION, CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA, *EXCERPTS FROM DEFENDANT UNION CARBIDE CORPORATION'S MOTION FOR RELIEF FROM ORDER ON COLLATERAL ESTOPPEL*, CIVIL ACTION NO. 02-C-9005 DECEMBER 11, 2002

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION

ASBESTOS MASTER FILE
CIVIL ACTION NO: 02-C-9005

DELIBERATE INTENTION
JUDGE ALAN D. MOATS

DEFENDANT UNION CARBIDE CORPORATION'S MOTION FOR RELIEF FROM ORDER ON COLLATERAL ESTOPPEL

Comes now Defendant Union Carbide Corporation and under West Virginia Rule of Civil Procedure 60(b) moves for relief from the Court's November 22, 2002 Order granting Plaintiffs' Motion for Collateral Estoppel and preventing Union Carbide from defending itself on the first four elements of "deliberate intention" liability under West Virginia Code § 23-4-2(c)(ii). . . .

* * *

Appendix M

IV. OFFENSIVE COLLATERAL ESTOPPEL IS UNFAIR IN THIS PROCEDURAL CONTEXT.

Even if the foregoing common law and statutory impediments did not exist, application of offensive collateral estoppel here would violate governing fairness considerations. *See Conley v. Spillers*, 171 W.Va. 584, 592, 301 S.E.2d 216, 224 (1983) ("'The general rule should be that in cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use of offensive collateral estoppel.'") (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)). In their written and oral submissions, Plaintiffs have repeatedly argued that fairness considerations do not apply because the Mass Litigation Panel severed trial of deliberate intention claims from trial of the premises claims and thus prevented the deliberate intent plaintiffs from being present in the premises Phase I trial. Any restriction on Plaintiffs' volition, however, is not controlling. Instead, application of collateral estoppel is unfair because the deliberate intention plaintiffs "could easily have [been] joined in the earlier action" by the West Virginia courts.

As the Court noted at the November 13th hearing, "in retrospect, perhaps all of these issues could have been joined together as the [premises and products] trial unfolded, but we didn't really see that before." (Hearing Trans. at 85:10-13). By failing to join the deliberate intention claims in the earlier trial and then using the verdict from that trial to estop Union Carbide, the Court has set up the classic "wait-and-see" offensive collateral estoppel trap explicitly condemned by both the United States Supreme Court and the West Virginia Supreme Court of Appeals.

Conley v. Spillers, 171 W.Va. 584, 592, 301 S.E.2d 216, 224 (1983) ("Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment.") (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)).

The Court's chosen procedure is unfair because, contrary to Plaintiffs' counsel's suggestions at the November 13th hearing, Union Carbide could not have used any favorable verdict in the earlier trial to estop the deliberate intention plaintiffs. *See Conley*, 171 W.Va. at 590 n.6, 301 S.E.2d at 221 ("under due process concepts a judgment cannot be binding on one who is not a party to the original suit"). Furthermore, Union Carbide had no notice that it should be litigating deliberate intention issues, which were due for a later trial and which, under *Tolley*, are very different from premises liability issues. At the most basic level of equity and judicial propriety, the courts of West Virginia should relieve Union Carbide from this unfair application of collateral estoppel.

* * *

Appendix M

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APPENDIX N — STATE OF WEST VIRGINIA EX REL. UNION CARBIDE CORPORATION, PETITIONER V. THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO: 02-C-9004 AND 02-C-9005), *EXCERPT FROM PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, PETITION FOR APPEAL*, APRIL 24, 2003

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNION CARBIDE CORPORATION

Petitioner/Defendant - Below

v.

THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO: 02-C-9004 AND 02-C-9005)

Respondents

MEMORANDUM OF LAW IN SUPPORT OF UNION CARBIDE CORPORATION'S PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, PETITION FOR APPEAL

Appendix N

. . .

UCC now asks this Court to recognize the disastrous ramifications of the aggregation of claims into the Phase I Trial and prohibit enforcement of the TSO and Phase I Trial Order for the following reasons:

- The lack of any reasonable semblance of the requirement of commonality in the product and premises liability cases aggregated in the Phase I Trial which prejudiced UCC by preventing it from exercising its right to be heard and to defend individual cases in a meaningful manner, in violation of basic guarantees of due process under the United States and West Virginia Constitutions.

- The existence of numerous claims resulting from events in other states that under West Virginia choice of law principles require the application of the other states' laws, coupled with the trial court's application of only West Virginia law, violated the due process and federalism limitations on choice of law as set out in the United States Supreme Court ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

. . .

Appendix N

The bifurcation of the plaintiffs' claims into a Phase I liability trial and Phase II causation and damages trial also independently grounds a writ of prohibition because:

. . .

- The use of a punitive damages multiplier violated basic guarantees of due process under the United States and West Virginia Constitutions, and is inconsistent with settled West Virginia law. In addition, the determination of punitive damages based on conduct outside West Virginia violated the federalism limitations of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

The finding of collateral estoppel in the Deliberate Intent Proceedings based upon the premises liability findings in the Phase I Trial compounded each of the errors above, and contained the following violation of UCC's due process rights and errors in the application of West Virginia law that warrant the granting of the writ:

- The finding of collateral estoppel violates the due process principle that collateral estoppel can only apply when the party against whom the earlier decision is asserted had a "full and fair opportunity" to litigate that issue in the earlier case, thus violating the U.S. Constitution, *Parklane Hosiery Co.*

Appendix N

v. Shore, 439 U.S. 322, 327 n.7 (1979) and West Virginia Constitution, Syllabus Point 8, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).

Dated: April 24, 2003

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Donald Fields, Jr.
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Earl Flowers
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Appendix O

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No. 03-319

IN THE

Supreme Court of the United States

UNION CARBIDE CORP.,
Petitioner,

v.

THE HONORABLE ARTHUR M. RECHT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	12
I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT"	12
II. THE FIRST QUESTION PRESENTED DOES NOT MERIT REVIEW	15
III. THE SECOND QUESTION PRESENTED DOES NOT MERIT REVIEW	19
IV. THE THIRD QUESTION PRESENTED DOES NOT MERIT REVIEW	22
A. Union Carbide Had A Meaningful (And Indeed, Lengthy) Opportunity To Be Heard	22
B. Petitioner Has Not Properly Presented Its "Choice-Of-Law" Issue Either To The West Virginia Courts Or To This Court	25
V. THE FOURTH QUESTION PRESENTED DOES NOT MERIT REVIEW	27
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
ACandS v. Godwin, 667 A.2d 116 (Md. 1995)	4
Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997)	2, 25
Bandini Co. v. Superior Court, 284 U.S. 8 (1931)	13, 14
BMW of N. America, Inc. v. Gore, 517 U.S. 559 (1996)	19
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	14
Fisher v. District Court, 424 U.S. 382 (1976)	13, 14
Jefferson v. City of Tarrant, 522 U.S. 74 (1997)	12, 14
Madruga v. Superior Court, 346 U.S. 556 (1954)	13, 14
Mayles v. Shoney's, Inc., 405 S.E.2d 15 (W. Va. 1990)	28
Mobil Corp. v. Adkins, 537 U.S. 944 (2002)	7, 24
North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973)	13
Phillips v. Shutts, 472 U.S. 797 (1985)	21, 26, 27
State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003)	16-20
West Virginia ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001)	4, 6
West Virginia ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996)	3, 4, 6

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" conveys a misleading impression of events before the West Virginia courts. Most significantly, petitioner elides almost entirely the important fact that the so-called "mass trial" that allegedly deprived Union Carbide of its due process right to defend itself had narrowed to only a *single* defendant (Union Carbide) by the time the defense presented its case to the jury. Accordingly, contrary to petitioner's arguments, the "Phase I" trial of issues common to plaintiffs suing Union Carbide provided the company an ample—indeed, generous—opportunity to defend itself. Moreover, future phases of the proceedings will allow the company to litigate causation and damages as to specific plaintiffs. In short, a more complete under-

standing of the proceedings before the West Virginia courts leaves no doubt that intervention by this Court is neither necessary nor desirable at this interlocutory stage.

1. ***Background of West Virginia Trial Court Rule 26.01.*** This Court has observed that our country is in the midst of an asbestos-litigation crisis. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). This litigation crisis results from an asbestos health crisis due to the continued manufacture and industrial use of asbestos long after its deleterious effects on human lungs became known.

Contrary to Union Carbide's baseless assertion, however, asbestos plaintiffs have not "flocked," *see* Union Carbide Petition for Writ of Certiorari (May 9, 2003), at 2 ("Pet."), to West Virginia as a result of the state's effective trial management procedures. Rather, asbestos litigation is naturally concentrated in areas—including West Virginia—with high levels of asbestos-related disease and mortality.[1] This petition relates to asbestos use at five plants located in West Virginia (at South Charleston, Institute, Alloy, Technical Center, and Sistersville) and one plant in Marietta, Ohio, directly across the Ohio River from Parkersburg, West Virginia.[2]

As a result of high levels of industrial asbestos use at these and other West Virginia facilities, the state's judiciary has been obliged to develop new trial management techniques to address large volumes of asbestos cases "threaten[ing] . . .[to]

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[1] While petitioner makes much of the fact that West Virginia ranked second among the fifty states in asbestos suit filings between 1988 and 1997, *see* Pet. 2, it neglects to mention that West Virginia has the third-highest asbestosis crude mortality rate among the states. *See* Centers for Disease Control and Prevention *et al.*, *Work-Related Lung Disease Surveillance Report 1999*, figure I-5.

[2] Parkersburg is substantially the largest city in either state in that part of the Ohio River Valley.

paralyz[e]" the lower courts' active dockets. *West Virginia ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 303-04 (W. Va. 1996). West Virginia Trial Court Rule 26.01—under which these cases have proceeded—directly reflects the "specialized approach" to asbestos personal injury litigation that the West Virginia courts have developed "over the past twenty years," and that they have successfully applied to resolve "tens of thousands of asbestos-related claims." Appendix to Union Carbide Petition for Writ of Certiorari (May 9, 2003), at 30a ("Pet. App.").

The heart of West Virginia's approach has been to sever, for initial trial, "the liability issues which are *common*" to large groups of pending cases. Pet. App. 30a. Subsequent proceedings, involving small groups of plaintiffs, address all other issues, including those relating to exposure, causation, and compensatory damages. *Id.* at 33a. This "common-issues trial" approach to asbestos litigation was expressly approved by the West Virginia Supreme Court in the 1996 *Appalachian Power* case. The court found that while "common issues" trials represent a "novel method of fact resolution," they have "much . . . to recommend [them] to all parties because [they] represent[] an effective and efficient manner to bring closure to these . . . [extremely numerous] cases without depleting valuable resources in the event that they are needed to satisfy a monetary award." *Appalachian Power*, 479 S.E.2d at 305.

The efficiency of the "common issues" approach derives from eliminating the repetition of key witnesses and evidence. As one of the judges who presided over *Appalachian Power* observed in connection with his earlier experience of claim-by-claim asbestos litigation: "The anatomy of an asbestos trial, about 50 percent of it, never changed. It was exactly the same, every case . . . . [Y]ou'll have a little scientific evidence on what [asbestos] is, and then how does it hurt somebody if it's inhaled. And then you've got this big body of state of the art evidence, . . . the information about

who knew what when, or when certain knowledge was available. . . . [W]ith respect to each defendant, what they knew and when they knew it determines their liability. That is repeated every time a case is tried, time and time again." 11/08/00 Tr. 56-57.

To implement the "common issues" approach, the *Appalachian Power* court "assigned three circuit court judges to preside over [common-issue] trials of [all] those asbestos-related cases which were [then] pending on the dockets of circuit courts throughout the state." *West Virginia ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 371 (W. Va. 2001). Pursuant to that Order, a series of six common-issue "trials were held in Kanawha County and Monongalia County, with the last [of these] common-issue trials held in 1998." *Id.* at 371. Those six trials "resulted in the resolution, in whole or in part, of what is estimated to be over 20,000 asbestos-related cases." *Id.* at n.6.[3]

3. *The Operation of TCR 26.01.* Following the resolution of the Kanawha and Monongalia County cases, the West

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[3] West Virginia is by no means alone among the states in its use of common-issue trials to successfully manage the enormous caseloads created by asbestos litigation. The Maryland courts, for example, ordered the consolidation of more than 8,500 individual asbestos actions—initially involving over 100 different defendants—for initial trial of common issues. *See ACandS v. Godwin*, 667 A.2d 116, 120 (Md. 1995). The Maryland Court of Appeals rejected defendants' claim that this approach denied them due process, even though "the 8,555 plaintiffs in the consolidation ha[d] different occupations, were exposed at different times, at different workplaces, have different diseases, and different medical histories." *Id.* at 146. The Court of Appeals found that "none of these factors diminishes the commonality of the Phase I issues." *Id.* Citing a long history of state and federal asbestos cases in which consolidation and common-issues trial methods had been used and upheld on appeal, the Court of Appeals found it "senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations." *Id.* at 146-49.

Virginia Supreme Court developed a generalized procedure "by which alternatives [to the traditional case-by-case trial] could be examined [in various mass litigation situations] and appropriate trial management plans could be developed." *Allman*, 551 S.E.2d at 371. That generalized procedure is set forth in Trial Court Rule 26.01. *See id.* at 371 and n.7.

Rule 26.01 establishes a "Mass Litigation Panel" ("Panel") consisting of six circuit judges appointed by West Virginia's Chief Justice to three-year terms. Pet. App. 24a (TCR 26.01(a)). Under the rule, any party, judge, or the administrative director of the West Virginia courts may file a motion seeking referral of actions to the Panel. The motion must identify, *inter alia*, "the nature of the actions sought to be referred," the "basis for the request," and "a listing of the particular cases in all the circuits for which a referral is being requested." Pet. App. 27a. That motion must be "served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director." *Id.* Following service, "[a]ny party shall have twenty (20) days . . . to file a reply memorandum stating its position and opposition, if any." *Id.* "Any affected judge may file a reply memorandum within ten (10) days thereafter." *Id.* Finally, after the filing of a motion and replies, the Chief Justice of the State Supreme Court may either act directly on the motion or recommend a hearing to inquire further into the desirability of the proposed referral. *Id.*

4. ***The Present Proceedings.*** In November 2000, two West Virginia circuit judges referred asbestos cases involving approximately 8,000 plaintiffs and 250 defendants to the Panel pursuant to 26.01(e). The Chief Justice referred the motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 11/17/00 Administrative Order at 1.

In October 2000, the trial judge held a status conference to determine goals for the Rule 26.01 hearing. He determined that an inquiry into common issues of law and fact would be a key issue. At the Rule 26.01 hearing in November 2000, the judge heard lengthy argument and testimony on that subject. For example, counsel for several defendants argued that the cases should not be referred because they lacked sufficient "commonality," while a representative for most of the many remaining defendants indicated that "there are some common issues and that there is a basis, under Rule 26" for consolidation. 11/08/00 Tr. 46. Following the hearing, the Chief Justice issued an administrative order accepting the recommendation that the referral motion be granted. 11/17/00 Administrative Order.

The trial judge initially assigned to develop a case management plan for these cases called for a series of traditional trials on "all issues" between small groups of plaintiffs and defendants. This strategy obviously departed from the "common issues" approach approved by the West Virginia Supreme Court in *Appalachian Power*, and both the plaintiffs and defendants petitioned the state's high court to block implementation of the plan. The West Virginia Supreme Court ruled that this original plan did not "fully meet" the need for a "fair[] and expeditious[]" approach to resolving the pending asbestos cases. *Allman*, 551 S.E.2d at 375-78.

After that decision, the West Virginia Chief Justice designated a new supervising judge who, in September 2001, adopted a "Report"—which petitioner refers to as the "Trial Scheduling Order" ("TSO")—setting forth a new case management plan for these cases. *See* Pet. App. 31a. In particular, the TSO canceled the "all issues" trials that were previously scheduled and indicated that all cases not successfully mediated by March 4, 2002, would be categorized into three groups—1) products liability claims, 2) premises claims, and 3) "deliberate intent" claims by employees under

West Virginia's workers compensation statute. The TSO scheduled for initial trial "liability issues which are *common* to all pending cases." Pet. App. 30a.

In December 2001, Mobil Corporation—which was then one of about 250 defendants in the case—filed a motion in the West Virginia Supreme Court seeking a writ of mandamus or prohibition to prevent implementation of this second trial plan. Mobil argued that the trial court had failed to conduct a proper inquiry into whether "mass litigation" could provide a fair determination of the claims presented. The West Virginia Supreme Court denied relief, and Mobil petitioned this Court for a writ of certiorari, arguing that the West Virginia courts had violated due process by purportedly aggregating thousands of claims against hundreds of defendants without any inquiry into the commonality of those claims. Union Carbide filed a brief supporting Mobil's effort to obtain certiorari. Plaintiffs opposing the petition pointed out (*inter alia*) that the West Virginia courts in fact *had* conducted a proper inquiry into commonality. This Court denied the petition. *See Mobil Corp. v. Adkins*, 537 U.S. 944 (2002).

On August 12, 2002, the trial court held a hearing to address certain remaining trial management issues. First, the court heard argument as to whether the juries determining common issues of fault in Phase I should also consider whether punitive damages "multipliers" should be applied to particular defendants based on the evidence presented regarding what they knew about the dangers of asbestos, when they knew it, and what actions they took as a result.[4]

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[4] A punitive damages "multiplier" allows total damages to be set by establishing punitive damages as a "multiple" of compensatory damages. Petitioner does not challenge the propriety of punitive damages multipliers generally.

Plaintiffs argued that it would make sense for the Phase I juries to consider this question:

> When you have the defendant there whose conduct is at issue and you have the evidence [of fault] that will shed a light on that conduct, then that same jury should not be told to stop at the end and not answer [the punitive damages] question when it has all of the information before it to answer that question.

8/12/02 Tr. 57.

The trial court agreed, holding that the Phase I juries would assign a punitive multiplier on the basis of the evidence they would hear as to defendants' "reprehensibility." 8/12/02 Tr. 95-97. In addition, as petitioner points out, the trial court also ruled that West Virginia law would be applied at the "first phase"—the common issues phase—of trial. 8/12/02 Tr. 172. Finally, the court ruled that employees' "deliberate intent" claims under W. Va. Code § 23-4-2 would be rescheduled to December 2002, rather than being heard at the same time as the products liability and premises cases. 8/12/02 Tr. 26.

Following the August hearing, as the trial date approached, most of the parties reached settlements. Indeed, as petitioner acknowledges, by the time of the September 23 hearing on motions in limine, *every one* of the "premises liability" defendants except for Union Carbide had settled, and only a small handful (including Union Carbide) of "products liability" defendants remained. Accordingly, the trial court determined that it would be sensible to combine the premises trial against Union Carbide with the products liability trial against Union Carbide and a few other defendants, rather than have two juries listen to the same evidence twice regarding what Union Carbide knew and when Union Carbide knew it. The court pointed out that the problem of "commonality of witnesses . . . if we had separate trials" had always been a concern, and that the "efficient, economical way" to try these

cases now that nearly all the defendants had settled was in a single proceeding. Pet. App. 61a.

The Phase I trial of common issues commenced on September 26, 2002, and initially involved claims against Union Carbide, Mobil Corporation, and Amchem Products, Inc. Both Mobil and Amchem left the case following the court's ruling on motions for judgment as a matter of law—Amchem because it prevailed on its motion, and Mobil because it settled. Pet. 13 and n.16. Accordingly, when it came time for defendants to present their case to the jury, *Union Carbide was the only defendant left in the case. See, e.g.,* Charles Shumaker, "*Mobil Settles; Carbide Now Lone Asbestos Defendant*," Charleston Gazette, October 10, 2002, at 1C.

Petitioner took *over a week* to put on its defense at trial, presenting lengthy (and conflicting) argument and testimony that Union Carbide's particular brand of asbestos ("Calidria") does not cause asbestos-related disease, and that, in any event, the company had discharged its duty to warn about the hazards of its asbestos products. *See* Pet. 13. On the premises claims, Union Carbide presented detailed evidence of its industrial hygiene policies and argued that the contractor at each premise (not the corporation Union Carbide) was contractually responsible for the protection of employees.

On October 24, 2002, after a day and a half of deliberations, the jury returned its verdict on the Phase I "common issues" in the form of answers to detailed "special interrogatories." On the product liability claims, the jury found that "Calidria" *was* a defective product, but that Union Carbide had *not* acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" in selling it, and therefore there was no need for a punitive damages "multiplier" in those cases. Pet. App. 92a-93a. On the premises claims, the jury found that Union Carbide *had* maintained "unreasonably dangerous" sites from

1945-1980 and, in so doing, *had* acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference." Pet. App. 91a, 94a. Accordingly, the jury assigned a punitive damages multiplier of three to be applied in premises cases in which plaintiffs succeed in showing causation and compensatory damages.

On November 4, 2002, former Union Carbide employees pursuing "deliberate intent" claims under W. Va. Code § 23-4-2 moved the trial court to apply offensive issue preclusion—which the West Virginia courts call "offensive collateral estoppel"—based on the Phase I jury's answers to the special interrogatories.[5] The court found that under West Virginia law, five elements must be satisfied for plaintiffs to prevail on a claim of offensive collateral estoppel:

1. The issues that will arise in the second case must have been "actually litigated" in the first case;
2. The first judgment must have been a final judgment rendered on the merits by a court of competent jurisdiction;
3. There cannot have been any change in the controlling facts or legal principles since the earlier case;
4. There can be no special circumstances indicating that applying the earlier judgment would be unfair; and
5. Estoppel is not available if the plaintiffs asserting it could have easily joined the first case, but failed to do so.

Pet. App. 16a-17a (citing West Virginia cases).

The court further found that plaintiffs had two different kinds of claims under § 23-4-2, and that the "actually liti-

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[5] Plaintiffs' motion was captioned "Motion for Collateral Estoppel to Prevent the Relitigation by Union Carbide of the Liability Elements of Deliberate Intent that were Determined in the Premises Liability Trial." Pet. App. 12a.

gated" requirement applied differently to the different claims. Specifically, under § 23-4-2(c)(2)(i), a plaintiff must show that the employer "acted with a consciously, subjectively, and deliberately formed intention to produce the specific result [of] injury or death to an employee." Pet. App. 17a-18a. Under § 23-4-2(c)(2)(ii), a plaintiff must show that the employer a) maintained a workplace in which a specific unsafe working condition presented a high risk of serious injury or death; b) had a subjective realization and appreciation of the risk presented; and c) that the condition violated a safety statute, regulation, or accepted industry practice. Pet. App. 18a-19a.

The court concluded that offensive collateral estoppel could not be applied to claims under § 23-4-2(c)(2)(i) because the jury had found only that Union Carbide had acted "intentionally, oppressively, willfully, maliciously, *or* in wanton or reckless conduct or criminal indifference":

> Because the interrogatory was asked in the disjunctive form, using the term "or," this Court cannot determine which of these terms the jury actually believed accurately described [Union Carbide's] actions. There is a possibility that the jury found [Union Carbide] acted [only] recklessly or willfully or wantonly, which . . . is insufficient to demonstrate deliberate intent under [§ 23-4-2(c)(2)(i)].

Pet. App. 20a. In contrast, the court found that the jury's finding *was* sufficient to demonstrate employer "realization and appreciation" of "unsafe working condition[s]" under § 23-4-2(c)(2)(ii), and that the presence of asbestos fibers in the air was an "unsafe working condition" that violated industrial hygiene standards. *See* Pet. App. 18a, 20a-21a. Finally, the court concluded that the remaining four elements of West Virginia's test for offensive collateral estoppel were clearly satisfied as to type (ii) claims. *Id.* at 21a-22a.

In February 2003, the trial court denied post-trial motions filed by Union Carbide. At that point, rather than proceed to

the Phase II "mini-trials" of causation and compensatory damages for small groups of plaintiffs with similar claims and exposure criteria, Union Carbide filed a "Writ of Prohibition, Or In the Alternative, Petition for Appeal" with the West Virginia Supreme Court. On June 17, 2003, the State Supreme Court issued a brief order simply stating that the "petition for writ of prohibition prayed for by the petitioner is hereby refused." Pet. App. 2a. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT."

Petitioner asks this Court to review the judgment below even though only one phase of the trial plan has been completed, and Union Carbide has not been held liable for any damages whatsoever. This Court has emphasized, however, that the statutory provision governing review of state court decisions, 28 U.S.C. § 1257(a), "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). A state court judgment is not reviewable unless it is "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* Plainly, the jury's entry of a verdict on the common issues tried in "Phase 1" of these proceedings is not "final as an effective determination" of this litigation. Issues relating to whether Union Carbide's behavior caused harm to any particular plaintiff and what compensatory damages should be assessed will not be addressed until the Phase II mini-trials.

The requirement of finality "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional

issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973). These ends are clearly implicated here. Perhaps most importantly, there is an ongoing state process in place for achieving a "final" determination of plaintiffs' claims—a process consistent with the way that West Virginia has resolved tens of thousands of asbestos cases in the past. At this point, the West Virginia Supreme Court has merely declined to exercise its discretion to review an interim step in that process, presumably because such interlocutory review would be premature. To hold that a state supreme court commits constitutional error by declining to grant extraordinary relief at an interlocutory phase would seriously intrude on the autonomy of state judiciaries. In addition, the unfinished procedural posture of this case creates a likelihood of piecemeal appeals.

Petitioner argues that a state supreme court denial of a writ of prohibition "is a distinct lawsuit that is finally determined even if further proceedings are to be had in the lower court." Pet. App. 6. The cases cited by petitioner in support, however, are very different from this case. All of them involved jurisdictional claims that could have ended the litigation. The dispute in *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954), was whether a state court had jurisdiction over a "case for sale of a vessel and partition of the proceeds," or whether "only the United States district court sitting in admiralty could take jurisdiction to consider such a case." Similarly, *Bandini Co. v. Superior Court*, 284 U.S. 8, 13-14 (1931), "merely dealt with . . . jurisdiction"; the "only question before [this Court was] . . . whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based." Finally, *Fisher v. District Court*, 424 U.S. 382, 383 (1976), presented the question whether a state court, rather than a tribal court, "has jurisdiction over an adoption proceeding in which all parties are members of the Tribe and

residents of the Northern Cheyenne Indian Reservation." Citing *Madruga* and noting that the dispute had been brought to the Montana Supreme Court as an original proceeding seeking an extraordinary writ, the Court in *Fisher* held that "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Id.* at 385 n.7.

This case, like *Madruga*, *Bandini*, and *Fisher*, arises from a request for an extraordinary writ. But the similarity ends there—unlike in those cases, the jurisdiction of the lower court is *not* at issue here and *no* decision by this Court could have the effect of ending the litigation. At most, petitioners would obtain a judgment from this Court providing guidance on how asbestos trials should be structured. Accordingly, concluding that the decision below is a final judgment would stretch the language of section 1257 far beyond the modest steps this Court has taken in permitting review in unusual cases, and far beyond any sensible meaning of the final judgment language. Indeed, the result petitioners seek would inappropriately relegate section 1257's final judgment rule to the status of "one of those technicalities to be easily scorned." *Jefferson*, 522 U.S. at 81 (citation omitted).

Petitioner also argues that "a refusal immediately to review the state court decision might seriously erode federal policy." Pet. App. 8 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)). Petitioner does not, however, identify any specific "federal policy" that might be "seriously eroded" by failure to review the interim decision at issue, or cite a *single* case remotely analogous to this in which the court has granted certiorari at an interim stage. Instead, petitioner makes the surprising claim that "federalism" requires this Court to find a constitutional violation where the West Virginia Supreme Court has declined to provide extraordinary relief. To the contrary, "federalism" obviously counsels that

this Court should be reluctant to interfere in ongoing state-court proceedings.

Petitioner also makes the curious claim that this Court should grant review now because the case may otherwise be "mooted on state law grounds," or Union Carbide may succumb to "pressure to settle," and the opportunity to review "important federal issues" may be "lost." Pet. 8. This argument stands the Court's criteria for granting certiorari on their heads—petitioner suggests that the Court *should* grant review because the case may otherwise be resolved without the need for the Court's intervention. That is, of course, a reason *not* to grant review. Moreover, as to "pressure to settle," Union Carbide is clearly represented by expert counsel who will have the opportunity to defend their client on issues of causation and damages in further proceedings. If Union Carbide is confident that it can show that its products and premises did not cause injury to plaintiffs, then it should proceed to Phase II trials on those issues; if not, it should consider settling. Significantly, however, Union Carbide's position is no different from that of any defendant defending multiple lawsuits raising the prospect of potentially substantial liability.

II. THE FIRST QUESTION PRESENTED DOES NOT MERIT REVIEW.

The petition makes little effort to justify review of the West Virginia courts' establishment of a punitive damages "multiplier" of three times compensatory damages under this Court's usual standards for issuance of the writ. Petitioner does not claim, for example, that the lower court judgment evidences confusion among the state supreme courts or the federal courts of appeal. It does not. Nor does petitioner claim that the result below is inconsistent with this Court's guidance regarding acceptable ratios between punitive and compensatory damages. It is not. Instead, petitioner is

reduced to arguing that the writ should issue because the lower courts' trial plan—which assigned responsibility for measuring defendant's reprehensibility (through assignment of a punitive damages multiplier) to the "Phase I" jury hearing evidence regarding defendant's knowledge of the dangers of asbestos and consequent actions—allegedly violated an ill-defined "right to due process" purportedly discernible from this Court's cases. There was no such violation.

In attempting to raise the specter of conflict with this Court's cases, petitioner predictably relies on *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). At the outset, however, the striking dissimilarities between that case and this bear emphasis. In *State Farm*, the Utah Supreme Court approved compensatory damages of $1 million and punitive damages of $145 million against State Farm for alleged bad faith, fraud, and intentional infliction of emotional distress in its representation of its insureds, the Campbells, in a wrongful death action. This Court acknowledged that "State Farm's handling of the claims against the Campbells merits no praise," *id.* at 1521: State Farm had improperly altered company records to make Campbell appear less culpable; had exercised poor judgment in taking the case to trial; and had amplified the eventual judgment's effect on the Campbells by first advising them that their assets would be safe, and then telling them, postjudgment, to put a for-sale sign on their house. *Id.* Nonetheless, this Court found that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. A punitive damages to compensatory damages ratio of 145 to 1 as punishment for inflicting a year and a half of emotional distress on the Campbells was understandably deemed excessive. *Id.*

This case could hardly be more different. Here, after hearing voluminous testimony from both sides regarding

Union Carbide's industrial hygiene practices at the sites in question, the jury found that Union Carbide had maintained "unreasonably dangerous" premises for over three decades, from 1945-1980. Pet. App. 13a. In so doing, the jury found, Union Carbide had acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference." Pet. App. 13a-14a. Based on these findings, the jury concluded that a punitive damages multiplier of three should be applied to compensatory damages in cases where plaintiffs ultimately succeed (in future "mini-trials") in showing causation and compensatory damages.[6] That determination is entirely consistent with *State Farm*'s admonition that "few awards *exceeding* a single-digit ratio" between punitive and compensatory damages will be appropriate. 123 S. Ct. at 1524 (emphasis added). Indeed, there is a long "history, dating back over 700 years . . . of double, treble, or quadruple damages to deter and punish." *State Farm*, 123 S. Ct. at 1524. The punitive damages multiplier adopted below falls squarely within that tradition.

Because Union Carbide cannot challenge the substantive result below (the 3-1 ratio), it resorts to challenging the process by which the result was achieved. Specifically, petitioner claims that the jury's determination of "punitive damages without hearing any evidence of harm to any specific plaintiff" (Pet. 15) violates this Court's requirement that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Pet. 16 (citing *State Farm*, 123 S. Ct. at 1523). Once again, however, *State Farm* is obviously distinguishable from this case. There, this Court found that the 145-to-1 punitive to compensatory damages ratio approved by the Utah courts was expressly intended to "rebuke State Farm for its nationwide activities." 123 S. Ct. at 1522. The Court found

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[6] The jury *rejected* the plaintiffs' claims for punitive damages in connection with their products liability claims.

that many of those activities "bore no relation to the Campbells' harm," and that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 1523.

The punitive damages multiplier of three—adopted by the jury below for use in premises cases—was not based on "nationwide activities" or on "independent . . . acts" from those "upon which liability was premised." To the contrary, this petition relates to punitive damages based only on Union Carbide's reprehensible behavior at five plants located in West Virginia (at South Charleston, Institute, Alloy, Technical Center, and Sistersville) and one plant in Marietta, Ohio (directly across the Ohio River from Parkersburg, West Virginia). *All* of the premises plaintiffs in these consolidated cases allege injury at *these* specific premises. The jury found that Union Carbide had acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" by maintaining "unreasonably dangerous" premises at *these* sites. Pet. App. 13a-14a. Accordingly, the behavior upon which the jury's punitive damages multiplier was based is in no way "independent from the acts upon which liability was premised." *State Farm*, 123 S. Ct. at 1523. To the contrary, that behavior is the basis of *every* claim of *every* premises plaintiff in this case.

Equally importantly, *no* punitive damages have actually been awarded at this point. The question whether Union Carbide's maintenance of "unreasonably dangerous" premises actually caused damages to individual plaintiffs, as well as the proper compensation for such damages, will be litigated in Phase II small-group trials that have not yet taken place. Only where Union Carbide's reprehensible behavior is ultimately found to have caused damages to particular individuals, and compensatory damages are awarded, will the punitive damages multiplier adopted by the "common issues" jury be applied. Actual punitive damages—if any—will thus

be three times *the specific compensatory damages awarded for specific harm that petitioner caused a specific plaintiff*. It is undeniable that such punitive damages will directly calibrate Union Carbide's punishment to the harm that it caused individual plaintiffs. Accordingly, petitioner's suggestion that punitive damages here, as in *State Farm*, "b[ear] no relation to the [plaintiffs'] harm," is simply incorrect, and its arguments for review of the first question presented should be rejected.

III. THE SECOND QUESTION PRESENTED DOES NOT MERIT REVIEW.

Union Carbide's second question presented is only a minor variation on its first: petitioner argues that applying the punitive damages multiplier determined below "to premises cases from Marietta, Ohio" would violate "this Court's holding in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 571, 73 (1996), and [*State Farm v.*] *Campbell*, that principles of state sovereignty and comity prohibit a State from using economic sanctions to change conduct in other States." Pet. 18. Once again, however, this case is worlds removed from *State Farm*.[7]

As described above, *State Farm* was a suit by individuals insured by State Farm against the company seeking damages for bad faith, fraud, and intentional infliction of emotional distress. This Court found that the "case . . . was used as a

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[7] *BMW v. Gore* is even farther afield. There, this Court pointed out that the behavior punished by the lower court judgment was entirely legal in many states. *See* 517 U.S. at 569 & n.13. It held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. Here, in contrast, petitioner does not suggest that while maintaining "unreasonably dangerous" premises "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" is illegal in West Virginia, it would be "lawful conduct" in other states.

platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion ma[de] explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct[ed] toward the Campbells." 123 S. Ct. at 1521. The *State Farm* Court concluded that an award of punitive damages on that basis is improper: "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion [in the case], and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." *Id.* at 1522.

Plaintiffs here, in contrast, do not seek to punish Union Carbide for its "operations throughout the country." Indeed, even petitioner does not maintain that the punitive damages multiplier adopted below reflected any effort to "condemn[Union Carbide] for its nationwide policies." Rather, as previously noted, the punitive damages multiplier applies only to premises claims in connection with the five West Virginia plants at issue, and a neighboring Ohio plant.

Petitioner's second question presented thus essentially reduces to the suggestion that the West Virginia courts may have improperly applied (or failed to apply) West Virginia choice-of-law analysis to the relative handful of plaintiffs in these cases claiming injury at the Marietta, Ohio site.[8] Whether true or false, that is not a question meriting review by this Court, but is, at most, one for the West Virginia Supreme Court. And petitioner does not appear even to have laid the groundwork for a proper objection to that Court regarding the trial court's choice-of-law ruling. As this Court held in *Phillips v. Shutts*, 472 U.S. 797, 816 (1985), the first step in demonstrating that some law other than forum law

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[8] As further set forth *infra* at 26, the record does not reflect precisely how many such plaintiffs there are because petitioner failed to present evidence on that issue to the trial court.

must be applied is a showing of a "material" conflict on issues relevant to the case. Here, petitioner provides no evidence whatsoever that it properly established *any* such conflict between West Virginia law and that of another state before the trial court prior to the choice-of-law ruling. Nor does petitioner reference any post-ruling arguments to the trial court framing the issue.

Finally, petitioner seizes on the language of the trial court's "Special Interrogatory 4" to argue that the punitive damages award was based on "hypothetical claims," rather than those of plaintiffs actually before the trial court. Pet. 18 and n.21. Special Interrogatory 4 asked the jury:

> Do you find from a preponderance of the evidence that, when non-employee workers were present on the sites owned by Union Carbide, Union Carbide acted intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages?

Pet. App. 13a-14a. The jury answered "yes." *Id.* Nothing about this question and answer, however, suggests that the jury's finding was based on "hypothetical claims." Rather, the jury heard extensive evidence that Union Carbide maintained "unreasonably dangerous" premises, in blatant disregard for the safety of the workers at those sites. Union Carbide primarily defended on the ground that the workers were "employees of contractors," not of Union Carbide, and that "the contractor was contractually responsible for the protection of its employees." Pet. 13-14. Accordingly, it is disingenuous of Union Carbide now to suggest that Special Interrogatory 4 was flawed because it *acknowledged* Union Carbide's *own argument* that many of the worksite plaintiffs were *not* Union Carbide employees.

IV. THE THIRD QUESTION PRESENTED DOES NOT MERIT REVIEW.

Petitioner's third question presented is premised on the notion that the trial below represented a "mass trial" that denied Union Carbide a reasonable "opportunity to be heard." Pet. at 19. As set forth above, however, by the time the trial reached defendant's presentation of its case, *Union Carbide was the only defendant left in the trial.* As a result, the idea that Union Carbide was not given an "opportunity to be heard" sufficient to comport with due process borders on the absurd. In any event, Union Carbide does not even attempt to demonstrate that this question satisfies the Court's criteria for issuance of the writ.

A. Union Carbide Had A Meaningful (And Indeed, Lengthy) Opportunity To Be Heard.

Petitioner does not argue that the consolidation of plaintiffs' suits against it directly conflicts with any specific precedent of this (or any other) Court, but instead vaguely maintains that the trial denied it the opportunity to be heard "in a meaningful manner." Pet. 19. More specifically, while petitioner acknowledges that aggregating cases for trial "does not *per se* violate the requirement of due process," it claims that "[i]n this case the aggregation did violate due process because the lack of commonality and prejudice meant [Union Carbide] could not exercise its right to be heard." Pet. 20.

Given the fact that Union Carbide was the sole defendant to present its arguments to the jury, it is frankly difficult to understand exactly what petitioner is talking about. It appears, however, that petitioner may wish to challenge the West Virginia courts' original determination that these cases contained sufficient common factual and legal issues to justify grouping them together for trial—but yet without explaining how that determination was made, or that it was

previously challenged before the West Virginia courts and this Court.

Consideration of commonality began in August 2000, when the Chief Justice of the West Virginia Supreme Court referred the Rule 26.01 motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer" these asbestos cases. 12/21/00 Administrative Order at 1. At a brief October 2000 hearing, the trial judge determined that "the major issue" for a subsequent hearing would be whether the cases "generally come in" under Rule 26.01, that is, "[d]o they involve a common question of fact, common issues [of law]?" 10/17/00 Hearing Tr. at 23.

The transcript of the November 8, 2000 hearing on commonality runs to more than 100 pages. Counsel for several of the 250 defendants then involved in the case—specifically, USX and CSX Transportation and Norfolk Southern Railway Company—argued at the hearing that the cases did not exhibit the commonality of issues required by West Virginia Rule 26. However, counsel speaking "on behalf of most of the defendants" presented a contrasting view, stating that "defendants do believe that there are some common issues [to be tried] and that there is a basis, under Rule 26 . . . for the handling of asbestos cases with a referral to the Mass Litigation Panel." 11/08/00 Tr. 45, 46. Counsel for Union Carbide did not disagree. In findings of fact and conclusions of law submitted to the Chief Justice on November 15, 2000, the trial court agreed with "[t]he plaintiffs and defendants . . . that the cases should be sent to the mass litigation panel." 11/17/00 Order at 2. On November 17, 2000, West Virginia's Chief Justice issued an order adopting the lower court's findings and conclusions.

In December 2001, after the trial court's adoption of the trial plan now being implemented, Mobil Corporation unsuccessfully sought mandamus from the West Virginia Supreme

Court to stop the consolidated trial from going forward. Mobil then petitioned this Court for a writ of certiorari, arguing that the West Virginia courts had consolidated thousands of cases against hundreds of defendants without any inquiry into the commonality of those claims, and that the consolidation violated due process. In opposing the petition, plaintiffs pointed out (*inter alia*) that the West Virginia courts in fact *had* conducted a proper inquiry into commonality, as described above. This Court denied the petition. *See Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002).

Union Carbide, which filed a brief in support of Mobil's petition with this Court, appears to wish to revisit this issue. Clearly, however, whatever appeal Mobil's arguments had in 2001, when the consolidation did, indeed, involve hundreds of defendants—albeit *after* a proper inquiry into commonality—has now evaporated. Again, it cannot be overemphasized that Union Carbide was *the only defendant* to present its defense to the jury on the Phase I common issues. Petitioner had ample opportunity to argue its case. And argue it did. On October 8, 2002, plaintiffs rested their case-in-chief against Union Carbide, which promptly began presenting its defense. For over a week, petitioner presented and presented, in arguments to the jury and live testimony totaling close to two thousand pages of trial transcript.[9] In light of this fact, Union Carbide's claim that it was denied a reasonable opportunity to be heard is simply preposterous.

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[9] As noted above, Union Carbide argued on the products claims that its particular brand of asbestos ("Calidria") does not cause asbestos-related disease, and that, in any event, the company had discharged its duty to warn about the hazards of its asbestos products. *See* Pet. 13. On the premises claims, Union Carbide argued that the contractor at each premise (not Union Carbide) was contractually responsible for the protection of employees. *See Id.* 13-14. These thousands of pages of arguments do not address the specifics of whether any individual plaintiff was harmed, because such issues of causation and damages are to be tried in Phase II small-group trials.

It follows that petitioner's half-hearted effort to analogize this case to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), fails as well. As petitioner acknowledges, the class at issue there was intended "to achieve a global settlement of current and future asbestos-related claims nationwide" against *all* potential defendants. Pet. 20. The proceedings here do nothing of the sort. Rather, they will adjudicate the liability of a *single* defendant, Union Carbide, to *specific*, identified plaintiffs for *current* claims arising primarily from exposure in West Virginia. Indeed, even petitioner stops short of claiming a specific conflict between this case and *Amchem*, because clearly there is none. Unlike all of the myriad potential defendants in *Amchem*, petitioner had a full and fair opportunity to defend itself on the issues tried in Phase I, and will have a further opportunity to do so in Phase II trials on causation and damages.

B. Petitioner Has Not Properly Presented Its "Choice-Of-Law" Issue Either To The West Virginia Courts Or To This Court.

The second half of petitioner's argument in connection with its third question presented is even more befuddling than the first. Petitioner does *not* claim that the question whether the West Virginia courts properly applied long-settled West Virginia precedent governing conflicts of law in these cases is an issue meriting review by this Court—and of course it is not.[10] Rather, petitioner makes the unusual argument that the West Virginia courts' purported "disregard of *Shutts*" somehow calls the fundamental fairness of employing a consolidated trial against Union Carbide into question, purportedly making *that* an issue warranting this Court's review.

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[10] As noted above, *see* Part III, *supra*, that question is, at most, one for the West Virginia Supreme Court. That Court has not, however, ever addressed the issue, presumably because—as further discussed below—petitioner has failed properly to present it.

First, *Phillips v. Shutts*, 472 U.S. 797 (1985), is obviously inapposite here. In *Shutts*, this Court held that in order for a forum state—Kansas, in that case—to apply forum law to claims asserted by a class action, the state "must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22. Significantly, however, even though some "97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit," *id.* at 814-15, this Court held that there could be no constitutional defect in Kansas' application of forum law without a prior showing of an actual conflict on issues relevant to the case: "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

Here, although petitioner repeatedly suggests that West Virginia is a "magnet state for the filing of asbestos cases," *see, e.g.*, Pet. 19, it does not appear to have presented evidence to the trial court proving that any significant number of the plaintiffs (let alone 97%) "had no apparent connection" to West Virginia. Although the record thus does not reveal exactly what percentage of the plaintiffs reside in, claim exposure in, or otherwise have an "apparent connection" to West Virginia, there is no doubt that claimants with an obvious connection to West Virginia represent the vast majority of the plaintiffs in these consolidated cases.

More importantly, notwithstanding the requirement of *Shutts*, petitioner also does not appear to have made *any* effort to demonstrate to the trial court that there are specific, "material" conflicts between West Virginia law and that of another state that are relevant here. Indeed, even in its petition to this Court, petitioner's entire discussion of "material" conflicts is limited to footnotes, *see* Pet nn. 29 and 31.

Significantly, however, petitioner does not cite to any pleading or transcript before the trial court where Union Carbide (or anyone else) elaborated those (or any other) claims of conflict as required by *Shutts*.

Of course, even had Union Carbide done so, that would not make its third question presented any more worthy of review. Again, petitioner *does not seek review of the West Virginia courts' choice-of-law ruling*. Instead, petitioner's third question presented suggests that petitioner should be permitted an interlocutory challenge to West Virginia's entire Rule 26.1 process for consolidating cases *because* the West Virginia court purportedly failed to apply the state's settled conflicts law. That simply makes no sense. The proper way to challenge the trial court's choice-of-law ruling would, of course, be to appeal that ruling to the West Virginia Supreme Court at such time as any judgment against Union Carbide becomes final under state law. Petitioner has not done so yet, but the option remains open to it in the event (which, from the petition, appears questionable) that petitioner properly presented and preserved the issue before the trial court. In the event that it did not, petitioner certainly should not be allowed to revive its choice-of-law claim by merely cloaking it in due process language.

V. THE FOURTH QUESTION PRESENTED DOES NOT MERIT REVIEW.

Petitioner's final question presented bears little discussion. Petitioner does not seriously suggest that the lower court's routine application of West Virginia law on collateral estoppel will create conflict among jurisdictions, or that it conflicts with any specific precedent of this Court. Instead, petitioner merely seeks correction of an alleged error by the trial court—specifically, the court's ruling that the jury finding that Union Carbide acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct"

satisfies § 23-4-2(c)(2)(ii)'s requirement of employer "realization and appreciation" of the existence of unsafe working conditions.

Petitioner argues that the trial court's interpretation of § 23-4-2(c)(2)(ii) is inconsistent with the West Virginia Supreme Court's ruling in *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15, 19 (W. Va. 1990). *See* Pet. 28. If so, petitioner's proper recourse is, once again, obviously to the West Virginia Supreme Court. As with petitioner's choice-of-law claim, mere invocation of a vague "right to due process" cannot transform a purported misapplication of settled state law into a federal constitutional claim meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-319

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IN THE

Supreme Court of the United States

UNION CARBIDE CORPORATION,

Petitioner,

v.

THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO: 02-C-9004 AND 02-C-9005),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iii
Reply to Respondents' Reasons for Denying the Petition	2
I. This Court Has Jurisdiction.	2
II. Question One Deals With Procedural Due Process Requirements For Punitive Damages Not Substantive Due Process.	4
III. Question Two Deals With The Federalism Limitations On Punitive Damages Awards To Avoid Double Counting, Not Choice Of Law.	5
IV. The Mass Trial Lacked Commonality And Resulted In Prejudice.	6
V. UCC'S Choice Of Law Issue Advanced Below Implicates Substantial Constitutional Issues.	8
VI. The "Collateral Estoppel" Ruling Raises Constitutional Issues.	10
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 6

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931) 2

Bd. of Educ. v. Superior Court, 448 U.S. 1343 (1980) 3

Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) 10

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3

Fisher v. District Court, 424 U.S. 382 (1976) 2

Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 3

Madruga v. Superior Court, 346 U.S. 556 (1954) ... 2, 3

McKinney v. Fairchild Int'l, Inc., 199 W. Va. 718, 487 S.E.2d 913 (1997) 5

Cited Authorities

Page

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 10

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 8, 9

State ex rel. Mobil Corp. v. Gaughan, 211 W. Va. 106, 563 S.E.2d 419 (2002), *cert. denied*, 123 S. Ct. 346 (2002) 7

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) 4, 5, 6

Statute:

28 U.S.C. § 1257 ..... 2, 3

Rule:

Trial Court Rule 26.01 ..... 1, 7

Cited Authorities

Page

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Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 2

Petitioner seeks a writ of certiorari because permitting the unconstitutional "mass trial" to stand will eviscerate defendants' due process rights and the requirements of federalism by allowing a single state to devise a set of infirm constitutional procedures in complete disregard of those rights and requirements simply because of the exigencies created by asbestos litigation.

The degree of constitutional harm is illustrated by the Respondents' Brief in Opposition ("Opp.") which views the "mass trial," with its clear disregard for Supreme Court precedent that imposes the constitutional limits of due process and federalism on punitive damages, aggregation, choice of law and collateral estoppel, as "business as usual" in West Virginia.[1]

The decision below is out of step with constitutional requirements, this Court's precedents, and the decisions of a plethora of Federal and State courts that have correctly assessed these constitutional limits. Petitioner, Union Carbide Corporation ("UCC"), asks this Court not only to correct clear legal errors, but to address the constitutional issues raised in this petition and which pervade the rulings of which UCC seeks this Court's review.

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1. Respondents state that "West Virginia Trial Court Rule 26.01 . . . directly reflects the 'specialized approach' to asbestos personal injury litigation that the West Virginia courts have developed 'over the past twenty years,' and that they have successfully applied to resolve 'tens of thousands of asbestos-related claims.' " Opp. at 3. This statement of pragmatic success misses the point of this petition. The "end" can never justify unconstitutional "means." Further, Respondents neglect to state that those resolutions were all settlements. Although four common-issues mass trials were conducted in Kanawha County and two in Monongalia County none of them resulted in a determination of causation and damages in the second phase because they all settled. There has never been appellate review of a West Virginia mass trial.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE PETITION

I. This Court Has Jurisdiction.

Petitioner's request for a writ of prohibition and/or mandamus was a separate proceeding before the West Virginia Supreme Court. The state court's decision to deny the writ is "final" as to that proceeding and hence reviewable under 28 U.S.C. § 1257. This straightforward jurisdictional rule is well established and uncontroversial. As the leading treatise explains:

> Applications for [writs of prohibition, mandamus, and *quo warranto*] are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of § 1257(a), the state court judgment must conclusively determine the *right of the applicant to the writ sought.*

Robert L. Stern, *et al.*, *Supreme Court Practice* 159 (8th ed. 2002) (emphasis added).

Respondents argue that this Court may only have jurisdiction over an extraordinary writ when there is a jurisdictional claim and its resolution could end the litigation. Opp. at 13 and 14. But *Fisher v. District Court*, 424 U.S. 382 (1976); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931) and *Madruga v. Superior Court*, 346 U.S. 556 (1954) invoke no such requirement for finality. Instead they clearly rest on the principle described above: that writ actions

are separate proceedings, so that decisions denying writs are final for purposes of § 1257. *See Madruga* 346 U.S. at 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257"), *see also Bd. of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (1980) ("petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the [state] Supreme Court's judgment"); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court [denying writ] nonfinal . . .").

Absent this Court's review, phase II trials will be conducted for years, all pursuant to West Virginia's unconstitutional mass trial procedure. The Court should reach the issues raised by UCC now to bring the mass trial proceeding, and the attendant violations of UCC's due process rights and federalism principles, to an end.

Even under a narrower standard of jurisdiction over an extraordinary writ, this Court has jurisdiction under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Respondents do not challenge the availability of *Cox* except to question what "federal policy" is at stake. Opp. at 14-15. The federal policy at issue here is the violation of due process resulting from West Virginia's "specialized," but unconstitutional, approach to trial management for asbestos litigation and the West Virginia judiciary's encroachment upon the sovereignty of other states through its studied indifference to this Court's federalism precedents regarding choice of law and punitive damages. *See* Petition for a Writ of Certiorari ("Pet.") at 9.

II. Question One Deals With Procedural Due Process Requirements For Punitive Damages Not Substantive Due Process.

Question One deals with procedural due process. In opposition to Question 1 Respondents contend that a punitive damages multiplier of three times compensatory damages does not violate this Court's holdings on substantive due process in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) and its predecessors. Opp. at 15-17. The Respondents' substantive due process arguments miss the point – they are irrelevant to the issue of procedural due process.

The Respondents argue that the multiplier will be tailored to each plaintiff's claim as the multiplier is applied to each plaintiff's compensatory damages. Opp. at 18-19. This ignores the fact that the multiplier is, by definition, a constant. While a plaintiff's compensatory damages may vary in accordance with the loss that the plaintiff has suffered the multiplier remains the same regardless of the relationship, if any, between UCC's conduct and each individual plaintiff. The disconnect between UCC's conduct vis-à-vis the individual plaintiff and the constant punitive damages multiplier renders the award of such damages arbitrary and, therefore, in violation of due process.

III. Question Two Deals With The Federalism Limitations On Punitive Damages Awards To Avoid Double Counting, Not Choice Of Law.

Question Two deals with the federalism limitations on punitive damages awards and asks whether West Virginia can punish UCC for the conditions which allegedly were experienced by all non-employee workers in the Ohio facility, although many of those non-employee workers were not parties to the "mass trial." If a West Virginia court is going to adjudicate punitive damages for all workers at an Ohio plant then *Campbell* imposes two requirements: (1) that all workers be included in the case; and (2) that Ohio law must be applied.[2] *Campbell*, 123 S. Ct. at 1522. The Respondents address only the second requirement, and simply ignore that the first requirement is not satisfied, as UCC argues in its Petition.

If it is assumed that the conduct of UCC at its Marietta, Ohio plant is relevant to a determination of reprehensibility, then the jury must be told that it cannot punish UCC for conduct at that plant in relation to workers who are not part of the mass trial. *Campbell*, 123 S. Ct. at 1522-23. The reasoning for this is straightforward:

> Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) ("Larger damages might also 'double

2. West Virginia recognizes the doctrine of *lex loci delicti* so that "the substantive rights between the parties are determined by the law of the place of the injury." *McKinney v. Fairchild Int'l, Inc.*, 199 W. Va. 718, 727, 729, 487 S.E.2d 913, 922, 924 (1997).

count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

The jury in the "mass trial" received no such caution. *See* App. I to Pet. at 66a. Instead Special Interrogatory No. 4 asked the jury to determine UCC's liability for punitive damages due to UCC's actions directed towards "non-employee workers . . . present on the sites owned by Union Carbide." *See* App. J to Pet. at 94a. The jury was not instructed to confine its inquiry to workers at the sites in issue who were plaintiffs at the trial.

UCC is now subject to the possibility of multiple punitive damages awards for the same conduct should workers from the Ohio plant, who are not parties to the "mass trial" commence one or more separate suits. The conduct of the "mass trial" thereby violates the federalism limitations on the awarding of punitive damages articulated in *Campbell*.

IV. The Mass Trial Lacked Commonality And Resulted In Prejudice.

Respondents' main argument is that UCC was the only defendant in the "mass trial" after all other defendants settled or were dismissed. Opp. at 1, 9, 22, 24. This ignores the fact that 4500 plaintiffs who "were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods" were part of the trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); App. O to Pet. at 113a. It also ignores that premises liability claims arising from six premises, each with numerous

worksites,[3] were improperly combined in one trial with factually and legally distinct products liability actions. UCC's right to a meaningful opportunity to be heard was lost because the claims that were presented were put forth in the most general manner, and in most instances the details of the individual claim were not presented at all. *See* Pet. at 14 and 25-26.

Respondents then argue that the court below conducted a commonality inquiry when the initial referral of all West Virginia asbestos cases to the mass litigation panel ("MLP") under Rule 26.01 took place. Opp. at 23-24. Even if true, this is irrelevant. The current petition challenges the conduct of an actual trial that has been completed. In contrast, the inquiry referred to by Respondents took place at a time where no specific trial structure existed and years before the completion of the trial that is the subject of this petition. *See State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 112, 563 S.E.2d 419, 425 (2002), *cert. denied*, 123 S. Ct. 346 (2002).[4]

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3. To provide but one example, the South Charleston plant is 230 acres, has been in operation since 1925 with the buildings and chemical operations varying over time, and the number of employees has ranged from a high of about 6000 to a low of about 2000. The "mass trial" sought to determine if UCC premises were "unreasonably dangerous" in aggregate despite the variety of operations occurring at a plant such as the South Charleston plant over a 50 year period. *See also* App. G to Pet. at 51a.

4. For example, the products and premises cases were originally to be tried separately under the Trial Scheduling Order entered on February 26, 2002 ("TSO") (*See* App. E to Pet. at 31a) but on the eve of trial the products and premises cases were collapsed into one trial. *See* App. H to Pet. at 56a-57a. Indeed the TSO was not in existence in 2000 when the initial referral took place. *See* Opp. at 23.

The "mass trial" as conducted, not just as planned, lacked commonality and resulted in prejudice contrary to the requirements for an aggregation to pass muster under the Due Process Clause by ensuring an opportunity to be heard at a meaningful time and in a meaningful manner. *See* Pet. at 19-22.

V. UCC'S Choice Of Law Issue Advanced Below Implicates Substantial Constitutional Issues.

Respondents claim that UCC did not raise the issue of choice of law before the trial court. Opp. at 26-27. Respondents are wrong. The MLP at a hearing on August 12, 2002 heard argument as to the due process and federalism requirements attendant upon a choice-of-law analysis. *See* App. G to Pet. at 50a and 52a-53a. The MLP ruled that West Virginia law would apply to all aspects of the Phase I Trial:

> We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don't know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of this trial. And to the extent that anybody is aggrieved by that, your objection is noted and preserved.

See App. G to Pet. at 53a.

The MLP failed to conduct the requisite "significant contacts" analysis required by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Opp. at 26-27. Indeed, the MLP

stated that it understood the arguments as to the necessity of such analysis, but nonetheless determined that it would adopt West Virginia law regardless of any conflict. *See* App. G to Pet. at 53a.

Respondents misunderstand *Shutts*' "materiality" requirement and seek to hide behind the massive scale of the aggregation to impose a requirement upon UCC to show that a significant percentage of the claims in the "mass trial" lacked a connection to West Virginia. *Shutts*' does not contain such a requirement. Instead *Shutts* recognizes that it is impermissible to apply the law of the forum state to a claim if that law is different in a material way from the law of the state with the most significant contacts with the claim. *Shutts*, 472 U.S. at 816. The principle articulated in *Shutts* would be violated if UCC was presented with only one claim as to which an incorrect and materially different law was applied. However, in the "mass trial" there were numerous claims from numerous states each with its own laws. For example all of the claims arising out of the Ohio facility should have had Ohio law applied, and in the case of punitive damages the difference in legal standards was clearly material. *See* Pet. 25 n.31.

The Respondents seek to mischaracterize Question Three as a state law question dealing with the trial court's misapplication of West Virginia's choice of law jurisprudence. Opp. at 27. However, choice of law in the United States is inherently constitutional law. Douglas Laycock, *Equal Citizens and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250 (1992) (citing Justice Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 2, 6-7 (1945)). Choice of law is the principal protection of interstate federalism. *See* Arthur R. Miller and David Crump, *Jurisdiction and Choice*

of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 62 n.426 (1986). The MLP's application of West Virginia law without conducting a "significant contacts" analysis allowed it to determine asbestos liability issues for the entire country, thus thwarting the local policies of numerous states, in disregard of the federalism limitations imposed by the United States Constitution.

VI. The "Collateral Estoppel" Ruling Raises Constitutional Issues.

Respondents do not attempt to defend the trial court's clear violation of UCC's due process rights through its egregious collateral estoppel ruling. Instead, Respondents argue that the ruling only involves a state law question. Opp. at 27-28. To make such a claim, Respondents ignore the reasoning of this Court that it is a violation of due process to estop parties from presenting a defense when they have not had a full and fair opportunity to litigate the claim at issue. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who . . . has never had an opportunity to be heard."). Again, UCC's rights were sacrificed on the altar of expediency. The deliberate intent cases were "resolved" through a clearly unconstitutional misapplication of the collateral estoppel doctrine, so that the court could clear its docket. Efficiency trumps fairness in West Virginia.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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